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LECTURES  
ON  
JURISPRUDENCE  
OR THE  
PHILOSOPHY OF POSITIVE LAW

BY THE LATE  
JOHN AUSTIN  
OF THE INNER TEMPLE, BARRISTER-AT-LAW

EDITED  
BY ROBERT CAMPBELL  
OF LINCOLN'S INN, BARRISTER-AT-LAW



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## INTRODUCTION.

### ON THE PURPOSE AND SCOPE OF THE FOLLOWING LECTURES.

THE value and importance of the late John Austin's work in the field of jurisprudence have been now so long and so widely recognized that it would be superfluous to insist upon them in this place. Except by a very few persons, the recognition was late. Had it come earlier, the author might have been encouraged to complete the record of the work upon which he entered. As it is, that record breaks off in medio; and for the preservation and arrangement of what remains, the public are in great measure indebted to the ability and industry of the lady whose name is subscribed to the preface of the first posthumous edition. In that preface Mrs. Austin explained, by a personal narrative of consummate literary skill and absorbing interest, the reasons why the work was broken off and never resumed by its author. An attempt to abridge that narrative would be almost an injury to both the persons here referred to. In order, however, to enable the student to seize the point of view of the

original Lectures, the following bare outline of facts seems necessary.

John Austin was born in 1790. At a very early age he entered the army, in which he served for five years. He was called to the bar in 1818, after the usual preparation as a student. In 1820 he married the lady above mentioned, to whom he had been for several years attached. She belonged to a gifted family, the Taylors of Norwich; and to the attractions of great personal beauty in early life, added the enduring qualities of a clear and energetic intellect, high principles of action, and a large heart.

Possessing to excess the subtlety of mind which sometimes, when laid under conventional restraints, contributes to the reputation of a consummate lawyer, Mr. Austin was yet unfitted for success in business by delicate health and a too highly strung and sensitive organization. After a vain struggle in which his health and spirits suffered severely, he gave up practice in the year 1825.

In 1826 the University of London (now University College) was established. Among the sciences which it was proposed to teach was Jurisprudence, and Mr. Austin was chosen to fill that chair. As soon as he was appointed he resolved upon going to study on the spot what had been done and was doing by the great jurists of Germany, for whom he had already conceived a profound admiration. After some preliminary study of the German language, he went in the autumn of 1827 to Germany. Having visited Heidelberg, he established himself with his wife and child at Bonn, then the



residence of Niebuhr, Brandis, Schlegel, Arndt, Welcker, Mackeldey, Heffter, and other eminent men. With ready access to this society, and with the assistance of a young jurist as privat-docent in reading German books upon law, he found excellent opportunities for the study and preparation which he desired. In the spring of 1828 he returned to England and commenced his work in the chair.

His career as a professor opened brilliantly, and his first class included many who afterwards became most eminent in law, politics, or philosophy. But it soon became apparent that the inducements to the scientific study of jurisprudence in this country would not afford a succession of students to maintain an unendowed chair; and he found himself under the necessity of resigning.

In June, 1832, he delivered his last Lecture. In that year he published the volume entitled, "The Province of Jurisprudence Determined," in the form of six Lectures, accompanied by an Outline of the entire course of Lectures contemplated by him. This "Outline" is in itself a well-considered summary of the topics embraced by the field of law, arranged on a philosophical system. Subsequently (in 1834) an attempt was made by the Society of the Inner Temple to institute a course of instruction in scientific jurisprudence, and Mr. Austin was engaged to deliver a course of lectures. But from causes similar to those already mentioned, and which doubtless applied with still greater force to a scheme inaugurated by a close society, the attempt proved a failure.

In consequence of this double failure Mr. Austin finally abandoned the idea of pursuing in England the work of a teacher of jurisprudence. His activity was turned into other channels; and when periods of rest and improved health supervened, he was not disposed to pick up the scattered threads of unappreciated and interrupted work. Nor, although a demand was at length established for the published volume, which became out of print, could he be persuaded to republish it.

After his death Mrs. Austin (in 1861) by the advice of friends, edited a reprint of the volume containing "the Province," with the preface above referred to. This was followed two years later by two volumes containing all that by extreme diligence and assiduity could be found and put together of Austin's work. Subsequently the valuable notes of the original Lectures taken by J. S. Mill, who was a constant attendant upon the course, were placed in Mrs. Austin's hands for another edition. She commenced the preparation, but her death left the work unaccomplished, and it devolved, at the request of the executors, on the present editor, whose edition was published in 1869. Of this the edition of 1873 is a reprint with a few slight verbal corrections.

The large and increasing demand for Austin's Lectures for the use of students has suggested an abridgment, which has been attempted in the following pages. While endeavoring to preserve the train of thought, and much of the characteristic expression of the author, I have not hesitated to

diverge from the text where it appeared to me necessary, and I have occasionally introduced illustrations from some events of more recent date than the original work. It being remembered that the last of the Lectures was delivered in 1832, and that the same year was that of the original publication of "the Province," these passages will be readily distinguishable. In other passages where I have intentionally departed from the meaning of the text, I have either used brackets, and the initials "R. C.," or expressly pointed out by a note the place of divergence (as for instance on p. 401). For the text of the author so far as remaining extant the reader is referred to the larger edition.\*

Having thus briefly explained the circumstances under which the Lectures were originally delivered and published, I now proceed to indicate the salient points which, as I understand the author's method, appear to furnish the key to it.

The appropriate subject of jurisprudence, or the matter with which that science (as understood by Austin) is conversant, is Positive Law; that is, law established or "positum," in an independent political community, by the express or tacit authority of its sovereign or supreme government.

In order, therefore, to determine the province of jurisprudence, it is necessary to obtain a comprehensive and rigorous definition of its subject, namely, Positive Law. To distinguish positive law

\* A considerable part of the substance of the following analysis appeared in the "Edinburgh Journal of Jurisprudence" for October, 1863.—R. C.

from objects to which it is related by resemblance or analogy, and which are signified properly or improperly by the large and vague expression law, is the purpose of the work originally published by the author under the title of "*The Province of Jurisprudence Determined*;" corresponding to the first six Lectures of the series as now published.

It would be out of place in this brief abstract to attempt an outline of the method adopted in arriving at the requisite definition. Briefly, Positive Law may be described as consisting of commands set, as rules of conduct, by a sovereign to a member or members of the Independent Political Society wherein the author of the law is supreme.\* But in this description the object sought to be defined is implicated with other terms and notions, each of which can only be explicated by an intricate and difficult analysis. And the labor of mastering this analysis is not easily to be abridged.

As an illustration of the definition of positive law ultimately arrived at, I will here note one consequence which may seem, at first sight, peculiar.

What is commonly called International Law, is excluded from the proper province of jurisprudence. It is obvious that those rules commonly known as International Law, can have neither their source nor their sanction in common with the law embraced in the above description. The subject is, therefore, inevitably relegated to take its place in a department of a science which would properly be

\* "Law is the command of a sovereign containing a common rule of life for his subjects."—*Erskine's Principles of the Law of Scotland.* (1754.)

called that of Positive Morality ; and if language rigorously consistent were used, it would be termed not International Law, but International Morality.

Limited to the consideration of the positive laws or rules of a particular or specified community, jurisprudence is particular or national.

Although every system of law has its specific or characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied. Many of these principles are common to all systems—to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities. But the ampler and maturer systems of refined communities, besides being allied by the numerous analogies which obtain between all systems, are allied also by analogies between themselves so numerous and remarkable as to be the subjects of an extensive science. This science is called general Jurisprudence, or Philosophy of Positive Law.

The science of general jurisprudence is therefore distinguished, on the one hand, from particular or national jurisprudence, and on the other, from the science which concerns itself with the contemplation of law as it should be, or the adaptation of positive law to the wants of a community, which is the science of Legislation. It is, however, closely allied to each of these branches of knowledge. That a study of general jurisprudence may with advantage precede or accompany the study of a particular system of positive law is now generally

admitted even in England. The connection of general jurisprudence with the science of legislation is still more intimate. Nothing is more suggestive of improvement in an individual system than the study and comparison of analogous institutions in other systems; and if an example were needed, it would suffice to refer to the labors of the great Roman jurists, who, by a comparative study of the *jus gentium* (the law of the nations known to them), that is, by the general jurisprudence of their day, elaborated and perfected their own system to be a model for civilized communities in all later times.

Having defined the province of jurisprudence and distinguished general from particular jurisprudence, the next topic is the analysis of certain leading notions which are met with at every step in the field of jurisprudence, and which pervade every particular system of positive law. Such are persons, as those upon whom or for whose benefit laws are imposed : things, acts, forbearances, as the matter with which laws are conversant : wish, or desire, in those phases respectively called motive, will, intention, with the negative phases commonly included in the term negligence—in short, those notions which belong to the *modus operandi* by which laws effect their purpose of stimulating or preventing human action. Lastly, and as involving the analysis of all the above notions, to analyze the all-pervading and familiar yet most complex notions of right and injury.

Leaving the preliminary but necessary task of definition, the author proceeds to the body of his discourse by considering law under two aspects: first in relation to its sources and the modes in which it begins and ends; and secondly, in relation to its purposes and the subjects about which it is conversant.

In treating of law in relation to its sources and the modes in which it begins and ends, the following are the leading distinctions and topics adverted to:—

I. A law is set either by the Sovereign immediately, or by a person or persons in subjection, by the delegation or permission of the Sovereign.

II. It is set either in the properly legislative mode, or in the oblique mode of judicial legislation.

III. Although all laws flow from the Sovereign as their source (whether immediate or ultimate), they differ in the causes whereby the Sovereign has been moved to establish them. Amongst these causes perhaps the most important to be considered is custom. It is at once the most wide-spread in its operation, and the cause whose mode of operation has been most often misconceived. Many writers on jurisprudence have imagined that custom is itself law, or rather that the persons among whom the custom prevails are, as entertaining and enforcing the custom, the sources or authors of law. Accordingly law obtaining through custom has been erected into a distinct species and called *jus moribus constitutum*.

Now by Austin's analysis it becomes apparent that the phrase last mentioned is misleading, as involving the misconception just adverted to. It is nevertheless important that laws which arise in consequence of custom should be considered in relation to the custom as their cause. And for brevity, and because the expression is familiar, it is convenient to speak of law viewed in this aspect as *jus moribus constitutum*. But the phrase, as adopted by Austin, means, not that custom is the source of the law, but that the law has been fashioned by judicial decision upon pre-existing custom. The phrase indeed would be equally applicable to law fashioned by direct legislation upon pre-existing custom. But the phrase so employed would embrace laws to which it was never applied by the Roman lawyers. No one has ever imagined that laws of the class last mentioned emanated from any authority other than the legislature.

It must be confessed that an investigation into the nature of what is called customary law puts a severe strain upon the rigid definition laid down by Austin. There is indeed little difficulty in the case of a community enjoying a well-settled system of law like our own. It will readily be admitted, for instance, that the binding force of a custom such as the intestate descent of gavelkind lands in Kent to the sons equally, obtains, not by the will and practice of the men of Kent among whom the custom prevails, but by the authority and sanction of the Imperial Courts of Justice which maintain and enforce the custom as law. So in the case where a



certain course of dealing is set up as the general usage of merchants, or the usage of merchants in a particular trade. Whether or not the usage has the force of law depends on the decisions of the Courts; and many such usages are gradually established as law, first by their existence being proved, and the Court deciding that the usage so proved is good in law; and the Courts subsequently recognizing the usage as a good legal custom without special proof. In all these cases the usage is law, not by reason of the habit prevailing amongst those using it, but because a law has been fashioned by judicial decision upon the pre-existing custom. Again there would be no difficulty in the case of communities so destitute of any tie of political cohesion that they may be said to live in a state of nature. Here clearly there can be no positive law, nor anything like it.

But take the case of British India: a congeries of societies which the advent of British rule found in various stages of organization. Some of them had the rudiments of a system of property law; most were already fairly organized so far as relates to Police and Land Revenue; while in others the political cohesion itself was of a rudimentary type. In all these societies British rule for the first time introduced law (*jus*) in the full significance imparted to the word by Roman institutions—the command of the State pervading the transactions of the individual members of the society. What are here the relations of custom and law? The answer to this question is sketched with a light but

masterly hand in Sir H. Maine's interesting and suggestive book on Village Communities. I am informed by my friend Mr. Rattigan, who, as I understand, is preparing a book upon Customary Law in relation to India and particularly to the Punjab—a book which may be looked for with great interest—that the phase now assumed by this question in the last-named district is especially remarkable. It seems that as the waves of conquest passing the gates of the Northwest successively indented upon the Eastern plains the bonds of Hindoo and Mohammedan Law, the inhabitants of the frontier district, unaffected by those written codes, remained clinging with tenacity to their ancient village customs. Hitherto the sanction of these customs has consisted in the force of opinion exerted severally by the innumerable petty village communities; nor have those customs yet received any direct recognition from the State. To such a state of things the Roman notions of law, obligation, sanction, seem hardly applicable. The State can scarcely be said to prescribe as law a custom of which it has no cognizance. Nor can the notions of duty and sanction apply in the case of a custom, to contravene which has not been thought of as within the circle of human desires. The advent of British rule in fact meets with the reign of the Communes in their primitive shape, a form of society which has everywhere yielded to the stronger organization based upon Roman types. With the reign of Law in the Roman sense, introduced by British rule, the nature of the customs inevitably

became transformed in the manner indicated by Sir H. Maine. What was a flexible and bending custom becomes transmuted into a rigid rule of law. Such customs as may ultimately be established to be good, will obtain as law, not merely because they obtained as custom, but because they are established as law by the decisions of the tribunals. In the meantime and pending the final settlement of the questions which arise, such legal force as the customs enjoy consists not in the authority of the several communes, which can hardly be said to have the force of law, but in the anticipation by the local officers of Government, and by the people themselves, that the custom will be upheld if brought to the notice of the English Courts of Justice.

I have dwelt here upon this point of customary law, because the considerations just adverted to furnish a crucial test of what is meant by positive law as defined by Austin, and of the conditions of society under which a system of positive law can be said to exist. Those conditions, I think, imply a society organized on the principle that the command of the State largely pervades the relations and transactions of its individual members—a principle inherited from Roman institutions, and which is the backbone of modern civilization.

Much of what has been said of "customary law" applies to *jus prudentibus compositum*—law imagined to obtain by the authority of private lawyers, but which is really fashioned by judicial decision upon opinions and practices of the private and unauthorized lawyers.

IV. The next topic adverted to by the author is natural law, as the term is commonly understood by modern writers on jurisprudence. The author dilates on the various misconceptions to which the term has given rise. In doing so, he traces the notion of natural law as originating in the *jus gentium* of the Roman lawyers, and shows that this last-mentioned expression was used amongst the early Roman lawyers in a definite and purely historical sense, but that subsequently, and as handled by the later Roman lawyers, it became mixed up with certain speculations borrowed from the Greeks.

V. The author adverts to the distinction between law of domestic growth and law of foreign origin—the so-called *jus receptum*—and to the positive law closely analogous to the *jus receptum*, which is fashioned by judicial decision on positive international morality.

VI. The author then adverts to Equity in its various meanings, showing that the term as a species of law, is confined exclusively to Roman and English jurisprudence, and that in each it is a purely historical notion.

The author then proceeds to treat of law in relation to its purposes, and the subjects about which it is conversant.

In order to find a secure basis for a complete system of general jurisprudence, it is indispensable to discover an arrangement and division of the whole subject which shall possess sufficient precision, and at the same time deviate quàm minimè in

its terms from those already established and familiar.

Fragmentary as are the remains of Austin's work, this essential part has fortunately been left in a state so nearly complete, as to be a valuable guide to any subsequent workman having the patience to study the plan, and the skill to apply the materials so far prepared.

The author has traced outlines of a general arrangement and division of the science of law on two different systems, which may be called, by way of distinction, the conventional and the philosophical. The outlines of the first kind are chiefly to be found in the tables and notes appended to the latter volume of the large edition. Of nine or more of these tables, originally prepared by Mr. Austin, unfortunately only three remain. After a search which must have been most anxious and painful, the recovery of the others has been abandoned as hopeless. The second kind of outline I call, in contradistinction, the philosophical, because it is given as the result of Austin's own conception of the best arrangement, arrived at after careful comparison of the existing systems, combined with independent reflection. Such is the "Outline," published by the author in his lifetime along with the "Province," and which is only partially filled up by the Lectures as since published.

Of the tables just mentioned, "Table I." is headed "The arrangement which seems to have been intended by the Roman institutional writers." The arrangement intended by these writers, whatever it

was, is historically the basis of all arrangements in later systematic treatises; and therefore the plan which seemed to Austin to be theirs, is, undoubtedly, of all his outlines of a conventional type, the one of primary importance. The terms employed in this table are given in the language of the Roman classical jurists.

The arrangement, according to Austin, which the Roman institutional writers contemplated, was as follows :

Law (*jus*) was, in the first place, divided into "PUBLICUM" and "PRIVATUM;" the first (*jus Publicum*), "*Quod ad Statum Rei Romanæ—ad publice utilia—spectat.*" "*Quod in sacris, in sacerdotibus, in magistratibus consistit ;*" the second (*jus Privatum*), "*Quod ad singulorum utilitatem—ad privatim utilia—spectat.*" The Roman jurists have left us no systematic treatise upon public law; the elementary writers commonly confining themselves to private law. The latter is the subject of the Institutes of Gaius, the basis of the more familiar Institutes of Justinian, which again are historically the foundation of nearly all the more modern systematic treatises.

Private law again was by these writers classed into three great divisions: *Jus* (law) *quod ad Personas pertinet*; *quod ad res pertinet*; *quod ad Actiones pertinet*,—or, 1. *De Personis*; 2. *De Rebus*; 3. *De Actionibus*;—the first of these divisions being also indifferently called, *De jure Personarum—Divisio Personarum*: ἡ τῶν προσώπων διαίρεσις—*De condicione Hominum—De Statu Hominum—De Personarum Statu*.

In order to distinguish the classes of rights comprised by the first two of the above heads, it is necessary to form an accurate notion of what was meant by status. The labor which the author spent upon this point may be appreciated from a passage in his Lectures where he incidentally says, "For the purpose of ascertaining the meaning which should be assigned to the word status, I have searched the meanings which were annexed to it by the Roman lawyers through the Institutes of Gaius and Justinian, and through the more voluminous Digest of the latter." The result of this investigation appears to be shortly the following: The conditions (or status) of various persons, are not the sources of the differences in their rights, obligations, or capacities, but are constituted or formed of those very differences. What is the nature of the set of differences in rights, &c., which constitute a status, it is exceedingly difficult to define; their principal characteristics are, that they are attached to classes of persons; that they are unlimited in number and kind; that they sometimes are purely onerous, or consist of obligations only; that they may be peculiar to a single determinate individual, but can never belong to all persons indiscriminately. They are, however, finally determined only by an arbitrary line, leaving on one side such sets of rights, &c., as may be conveniently detached from the bulk of the system, for the convenience of the comparatively narrow classes of persons whom they concern, and leaving on the other side all other descriptions of rights. Keeping

in mind the meaning of status thus explained, the division of law into 1. *De Personis*; 2. *De Rebus*; and 3. *De Actionibus* becomes equivalent to the following: 1. The law of Status—2. Law regarding substantive rights and obligations in general minus the law of Status—3. The means by which rights are enforced when a resort to the tribunals is necessary.

Under the department of law *De Rebus* are again comprised the great subjects, *Dominium* (in the large signification of the word) and *Obligatio* (in the correct signification).\*

The class of rights comprised under the word *Dominium* contain again the following genera,—viz.: 1. *Dominium rei singulæ* (or *Dominium* in the strict acceptation, otherwise styled *Proprietas*, or otherwise *In Re Potestas*); 2. *Jura*, sive *Jura in Re aliena*; velut *servitus*, *Jus Pignoris*, &c.; 3. *Dominium Rerum per universitatem acquisitarum*, velut *Hæreditatis*, *Dotis*, *Feculii*, &c. The same class comprises also the cognate subjects of *Jus Possessionis*, and *Juris in re aliena Quasi Possessio*.

The class of rights comprised under *Obligatio* contains the following genera,—viz.: 1. *Obligationes ex Contractu et quasi ex Contractu*; 2. *Obligationes ex Delicto*; 3. *Obligationes quasi ex Delicto*.

1. *Obligationes ex Contractu et quasi ex Contractu*. This department relates to

\* *Obligatio*, as used by Roman lawyers, differs from "Obligation" as used by us. With us it is equivalent to "Duty." With them it is narrower in one sense, as being restricted to duties corresponding to Rights in personam. But it is used also by them to denote the Right in question as well as the vinculum including the right and correlative duty



(a) Obligations arising immediately from contracts and quasi-contracts,—that is, Primary obligations—obligations not founded on injuries, delicts, or wrongs ; the miscellaneous class of such obligations which can not be referred to contract, being said, by analogy, to arise from (quasi) contracts.

(b) Injuries consisting in the non-performance or in the undue performance, of those primary obligations : *e.g.*, Mora.

(c) Obligations arising immediately from those injuries, though mediately from the primary obligations of which those injuries are violations ; *e.g.*, Liabilities on an Action *ex contractu*, with the corresponding Right of Action residing in the injured party.

2. *Obligaciones ex Delicto*. This department relates to

(a) Delicts in the strict signification of the term : *i.e.*, Damage, intentional or by negligence (“*dolo aut culpâ*”), to absolute rights—to *jura in rem* (in the largest import of the phrase)—to *jura quæ valent in personas Generatim* (as opposed to *jura quæ valent in personas Determinatas*). As examples of Delicts, in the strict signification of the term, may be mentioned, assaults, and other offenses against the body ; libels, and other offenses against reputation ; thefts, considered as civil injuries ; forcible dispossession ; detention, *malâ fide*, from the dominus or proprietor of the subject ; trespass upon another’s land ; wounding, or otherwise damaging, his slaves, cattle, or other movables.

(b) The obligations incumbent upon the injur-

ing parties to restore, satisfy, &c.; with the corresponding rights of action, &c., which reside in the injured parties.

3. *Obligaciones quasi ex delicto*. The distinction between obligations *ex delicto* and obligations *quasi ex delicto* is considered by Austin superfluous and illogical. The obligations classed under this head by the Roman jurists arise from two causes:—

(a) Damage to the right of another by one's own negligence (*culpâ imprudentiâ, imperitiâ*).

(b) Damage to the right of another by some third person for whose delicts one is liable (*e.g.* “*filius in potestate*,” “*servus*,” “*aliquis eorum quorum operâ exercitor navis aut stabuli navem aut stabulum exercet*”).

The first of these classes Austin thinks would properly fall within the notion of *Delict*; those obligations of the second class, in which the party can not be said to be guilty of intention or negligence, might, he thinks, have been more properly referred to the class of obligations arising *quasi ex contractu*.

Whether the law of crimes, of punishments, and of criminal procedure, fell within the plan of the Roman institutional writers, Austin considers doubtful. The title in the *Institutes*, “*De Publicis Judiciis*,” seems not to be a member or constituent part of the work, but rather a hasty and incongruous appendix added on an after-thought. It, moreover, appears that criminal law was looked upon by the Roman jurists as properly forming a department of *Jus Publicum*; which was probably not included

in the treatises from which Justinian's Institutes were copied or compiled. Whether a similar title was appended to the Institutes of Gaius, is uncertain; the concluding portion of the manuscript being lost or illegible.

I have here transcribed in some detail the outline what Austin considered to be the arrangement intended by the Roman institutional writers, because it furnishes the key to his own system. Before, however, describing the scheme of arrangement adopted by Austin himself, I shall refer shortly to the remaining tables of the same nature with that above described.

Table II. is exactly coincident with Table I. in its divisions and arrangement. It differs, however, in its terminology, adopting, instead of the language of the Roman classical jurists, the terms which obtained among civilians from the latter portion of the 16th to that of the 18th century, many of which originated in the middle ages, or in times still more recent. The importance of these terms depends on the following considerations:—

1st. Some of these terms are better constructed than the corresponding expressions of the ancients; and are indeed the only ones, authorized by general use, which denote the intended meaning without ambiguity.

2ndly. Writers upon universal jurisprudence, upon the so-called law of nations, and even upon morals generally, who have drawn largely upon the system of the Roman law, have, in their express or tacit references to it, commonly adopted the terms

devised by modern civilians, or by commentators of the middle ages.

3rdly. These terms have been imported into the technical language of the systems which are mainly derived from the Roman: *e.g.*, the French law, the Prussian law, the common or general law of Germany.

It is also of importance to draw attention to the origin of the terms, because they are often introduced by expositors of the Roman law without sufficient explanation; and without opposing to, or collating with them, the corresponding expressions which were employed by the authors of the system.

Of this terminology the following is an important instance. Answering to the distinction of the classical jurists between *Dominium* (in its larger sense) and *Obligatio*, the favorite correlative terms among the modern civilians are *Jus in Rem* and *Jus in Personam* (*i.e.*, in personam *Certam sive Determinatam*). The importance of these terms will be better seen further on. In the meantime it may be remarked, that though "*Jus in Rem*" is never used by the authors of the Roman law as a distinctive term for a large division of rights, yet where the phrase *in rem* occurs in connection with a right, it always involves the notion of a right which avails against persons in general in contradistinction to rights which avail against a particular person. Consequently, modern Civilians, in search of a generic term to denote such rights, have found "*Jus in Rem*" a most convenient one, employing as its opposite the term "*Jus in Personam*" as a short

expression for "*Jus in Personam certam sive determinatam.*"

A third table, headed "Summary of Tables I. and II.," is the first step towards a more philosophical analysis founded upon the arrangement of the Roman jurists, and indicates the process by which the author is led to the main outlines of the system which he finally adopts.

The only remaining tables of a kind similar to those already noticed are Tables VIII. and IX. They are respectively headed, VIII. "The Arrangement which seems to have been intended by Sir William Blackstone;" and IX., "Exhibiting the *Corpus Juris* ('*Corps complet de Droit*') arranged in the order which seems to have been conceived by Mr. Bentham." The nature of the other tables, now irrevocably lost, can only be conjectured from scattered hints throughout other parts of the work.

These tables evince the great pains devoted by Austin towards studying the principles of division and arrangement of the science, according to the views of all the best and most celebrated authors of the systems accessible to him. This trait is very important as bearing upon the value of his own system. Were it not for this evidence of his having so anxiously measured and weighed the more celebrated existing systems which are recommended either by their intrinsic or their conventional value, it might be easy for a superficial inquirer to suppose his philosophical system built on a less stable foundation than it really is. It is because it is formed of tried materials, built together on a

plan designed after an analysis of the most approved structures, that it may be safely put forward as a valuable and indispensable model to all future English legal writers who aim at philosophical accuracy.

The leading divisions contemplated in Austin's own system appear to be the following. He adopts as his main division of the subjects with which law is conversant the twofold one of the Law of Persons, and the Law of Things. This division nearly corresponds with the *Jus Personarum*—*Jus Rerum*, of the Civilians, or with *Jus Quod ad Personas pertinet*—*Quod ad Res pertinet*, of the classical jurists; but differs from it in this respect, that instead of being, as with them, subordinated to the division of *Jus* into *Publicum* and *Privatum*, and co-ordinated with the *Jus Actionum*, it is held superior to all these divisions. The whole of the *Jus Publicum* and of the law of procedure is therefore distributed between the Law of Persons and the Law of Things, according as their several parts belong more properly to one or other of those main divisions, in the wide scope attributed to them by the author.

To understand the nature of the leading division thus adopted, it is necessary to refer to the definition of status already given in describing the system of the Roman institutional writers. Status is a set of rights attached to classes of persons, and distinguished by certain characteristics, but the exact definition of which is arbitrary. It is difficult in this short sketch to give a notion of the labor

expended by the author upon collecting from the original sources the exact meaning attached by the Roman lawyers to status. The result of this research is shortly expressed in the necessarily vague definition already given. What makes the conception so difficult to understand, is perhaps the fact—which Austin has been the first to point out—that while the idea expressed by status, as an aggregate of rights, capacities, &c., of a certain kind, is one inherent in all systems of law, the line which ultimately severs it from other sets of rights is quite arbitrary, and is determined not by the importance of the legal consequences attached to the status, but by mere convenience of arrangement. Employing, then, the term status in the sense of the Roman jurists, but adjusting the arbitrary line of demarcation to suit the whole arrangement which he contemplates, Austin lays down the following criteria, by which such aggregations of rights are to be detached from the body of the legal system :

1st, That the rights, &c., constituting the status, regard specially a comparatively narrow class of the community ; and that it is convenient to have them got together for the use of that class.

2ndly, That they can be detached from the bulk of the legal system without breaking the continuity of the exposition ; and that the so detaching them adds to the clearness of the exposition.

When once this idea of status is clearly apprehended, the meaning intended by the division between the Law of Persons and the Law of Things becomes apparent. The Law of Persons is the law

concerned with those rights which constitute status, or shortly the Law of Status. The Law of Things is the Law minus the Law of Status. Since the difference which constitutes a status can be better understood after the more general classes of rights belonging to the Law of Things have been expounded, the Law of Things is placed before the Law of Persons. But since it is impossible to obtain a division attaining perfect distinctness, it will be often necessary in traveling through the Law of Things to touch by anticipation upon a portion of the Law of Persons.

LAW OF THINGS.—Austin distributes the Law of Things under two capital departments: 1. Primary rights, with primary relative duties. 2. Sanctioning rights, with sanctioning duties. The first of these divisions is meant to include law regarding rights and duties which do not arise directly or immediately from injuries or wrongs; understanding the word injury or wrong in the largest sense, *e.g.*, including trespass or breach of contract. The second division regards rights and duties which arise directly and exclusively from injuries or wrongs; and includes the consideration of procedure, civil and criminal.

Primary rights.—The subdivision of Primary rights with their relative duties is fourfold:

1. Rights in rem as existing simply, or as not combined with rights in personam.
2. Rights in personam as existing simply, or as not combined with rights in rem.



3. Such combinations of *jus in rem* and in *personam* as are less complex.

4. Such more complex aggregates of *jura in rem* and in *personam* as are styled by modern Civilians, *universitates juris*.

The meaning here intended by the expressions in *rem* and in *personam*, has already been explained in commenting on the terms of the modern Civilians.

1. Instances of *jura in rem* are, Ownership or Property, Servitude, the right *quoad* third parties to the labor of a hired servant. Some rights in *rem* have no subject, such as a monopoly, right to my good name, &c. They are included among rights in *rem* because they avail against persons in general; *e.g.*, obliging all persons to forbear from selling the commodity in question, from slandering my reputation, &c. This department includes the enumeration of the different kinds of subjects of such rights; the limitations of such rights in extent or time; a description of the events by which such rights arise or are extinguished; and lastly, an account of the right of Possession.

It is in the discussion of this subdivision that the Lectures break off.

2. All rights arising from contract *quoad* the contracting party, or his representatives are rights in *personam*: *e.g.*, the right to payment for a thing sold and delivered against the buyer, or one representing him as heir or general assignee; the right *quoad* the hired workman to his services, &c. This

head was intended to comprise, I. Definition of leading terms, such as Promise; Convention; Pact; Contract; II. A consideration of the nature of Contract; III. A consideration of quasi-Contract, or events which, being neither contracts nor delicts, engender rights in personam.

3. A complex right, partaking of the nature of a right in rem and in personam, may be vested by the same event in the same party: *e.g.*, the rights arising from a sale completed by delivery with warranty.

Rights of this kind form the matter of the third subdivision of primary rights.

4. The last subdivision of primary rights comprises the description of universal succession arising either upon death or insolvency.

Sanctioning Rights.—The Lectures having broken off before arriving at this point, the subjects contemplated under the head of Sanctioning Rights can only be gathered from the "Outline." After expounding the nature of the distinction between civil and criminal delicts, it was intended to divide the capital department of Sanctioning Rights into:

- (1.) Rights and duties arising from civil injuries.
- (2.) Duties and other consequences arising from crimes.

(1.) The matter of this sub-department was to be treated in the following order:

I. Civil injuries to be classed and described with reference to the rights and duties whereof they are respectively infringements.

II. Rights arising from civil delicts (which are generally themselves rights in personam) are divided into two departments: (A.) Those arising from civil delicts which are infringements of rights in rem. (B.) Those arising from civil delicts which are infringements of rights in personam.

A. The first of these departments again severs into four sub-departments: (a) Rights of vindication. (b) Rights to satisfaction. (c) Rights of vindication, combined with rights to satisfaction. (d) Rights of preventing or staying, judicially or extra-judicially, impending or incipient offenses against rights in rem.

B. The second department severs into three sub-departments: (a) Rights of compelling, judicially or extra-judicially, the specific performance of such obligations as arise from contracts or quasi-contracts. (b) Rights of obtaining satisfaction in lieu of specific performance. (c) Rights of obtaining specific performance in part, with satisfaction or compensation for the residue.

III. The modes to be considered wherein these rights are exercised, and these duties enforced; in other words, Civil Procedure.

(2.) Under this head to be given—

I. Description of duties considered as relative or absolute.

II. Classification of crimes with reference to the rights and duties whereof they are respectively infringements.

III. Description of the consequences of crimes.

IV. Criminal Procedure and Police.

LAW OF PERSONS.—The arrangement of status or conditions was intended to be distributed under three principal classes: 1. Private conditions. 2. Political conditions. 3. Anomalous or miscellaneous conditions.

Private Conditions.—These are classed into, 1. Domestic and quasi-domestic conditions, such as Husband and Wife; Parent and Child; Master and Servant; Persons who, by reason of age, sex, or infirmity, are thought to require an extraordinary measure of restraint or protection. 2. Professional conditions.

Political Conditions.—These are to include, 1. Judges and other ministers of justice. 2. Persons whose appropriate duty is the defense of the community against foreign enemies. 3. Persons invested with rights to collect and distribute the revenue of the State. 4. Persons commissioned by the State to instruct its subjects in religion, science, or art. 5. Persons commissioned by the State to minister to the relief of calamity; *e.g.*, overseers of the poor. 6. Persons commissioned by the State to construct or uphold works which are thought to require its special attention; *e.g.*, roads, canals, &c.

Anomalous or miscellaneous conditions.—These include Aliens; Persons incapable of rights by reason of their crimes, &c., &c.,

The foregoing analysis omits to note some important practical suggestions for law reform embodied in the Lectures and Fragments as contained in the larger edition.

Of the very important considerations stated by the author on the subject of codification, it may be enough to say here that the question in this country, after some futile experiments, remains and is likely to remain for some time nearly where Austin left it. More important at present is the subject of legal education; a topic on which Austin held very decided views, and views which have largely assisted in maturing an effective public opinion. The following passage, for which I find no convenient place in the body of this work, is extracted from the detached matter contained in the larger edition. It appears to have been contained in the author's opening lecture either to the course delivered at the London University or to that commenced at the Inner Temple:—

“In order to enable young men preparing for the profession, to lay a solid basis for the acquisition (in the office of a practitioner) of practical skill, and for subsequent successful practice, an institution like the Law Faculty in the best of the foreign universities seems to be requisite; an institution in which the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon, and Feudal, as its three principal sources), and the actual English law (as divided into fit compartments), might be taught by competent instructors.

“In such a school, young men, not intending to practice, but destined for public life (*ad res*

gerendas nati'), might find instruction in the sciences which are requisite to legislators. Young men intended for administration (other than that of justice) would attend the Law Faculty; as, on the other hand, the men intended for law would attend the courses on the various political sciences, such as political economy, &c. For, however great may be the utility of the study of general jurisprudence to lawyers, generally; however absolute its necessity to lawyers intrusted with the business of codification, its importance to men who are destined to take part in the public business of the country is scarcely inferior.

"It is extremely important that a large portion of the aristocracy, whose station and talents destine them to the patrician profession of practical politics, should at least be imbued with the generalia of law, and with sound views of legislation; should, so far as possible, descend into the detail, and even pass some years in practice.

"If the Houses of Parliament abounded with laymen thus accomplished, the demand for legal reform would be more discriminating, and also more imperative; much bad and crude legislation would be avoided;—opposition to plausible projects coming from an unsuspected quarter. This, in the innovating age before us, is no small matter. And though lawyers, fully acquainted with system, alone are good legislators, they need perhaps a check on professional prejudices, and even on sinister interest.

"But such a check (and such an encouragement

to good lawyers) would be found in a public of laymen versed in principles of law.

“It appears to me that London possesses peculiar advantages for such a law faculty. The instructors, even if not practicing lawyers, would teach under the eye and control of practitioners; and hence would avoid many of the errors in which the German teachers of law, excellent as they are, naturally fall, in consequence of their not coming sufficiently into collision with practical men. The realities with which such men have to deal, are the best correctives of any tendency to antiquarian trifling or wild philosophy to which men of science might be prone. In England theory would be molded to practice.

“Besides the direct advantages of such an institution, many incidental ones would arise.

“In the first place: a juridical literature worthy of the English bar.

“Good legal treatises (and especially the most important of any, a good institutional treatise, philosophical, historical, and dogmatical, on the whole of the English law) can only be provided by men or by combinations of men, thoroughly grounded and extensively and accurately read. Such books might be produced by a body of men conversant (from the duties of their office) with the subjects, but can hardly be expected from the men who now usually make them; viz., not lawyers of extensive knowledge (whose practical avocations leave them no leisure for the purpose, although generally they

are the only men fit for the task), but young men, seeking notice, and who often want the knowledge they affect to impart.

“Such men as I assume a Law Faculty to consist of, being accustomed to exposition, would also produce well-constructed and well-written books, as well as books containing the requisite information. Excellent books are produced by German Professors, in spite of their secluded habits; many of them being the guides of practitioners, or in great esteem with them (*e.g.*, those of Professor Thibaut). In England, better might be expected, for the reason already assigned: viz., the constant view to practice forced upon writers by constant collision with practical men.

“Secondly: another effect of the establishment of a Law Faculty would be, the advancement of law and legislation as sciences, by a body of men specially devoted to teaching them as sciences; and able to offer useful suggestions for the improvement (in the way of systematizing or legislating) of actual law. For though enlightened practical lawyers are the best legislators, they are not perhaps so good originators (from want of leisure for abstraction) as such a body as I have imagined. And the exertions of such men, either for the advancement of Jurisprudence and Legislation as sciences, or in the way of suggesting reforms in the existing law, might be expected to partake of the good sense and sobriety to which the presence and castigation of practitioners would naturally form them.



“How far such an institution were practicable, I have not the means of determining.

“There would be one difficulty (at first); that of getting a sufficient number of teachers competent to prove the utility of learning the sciences taught by them; masters of their respective sciences (so far as long and assiduous study could make them so); and, moreover, masters in the difficult art of perspicuous, discreet, and interesting exposition: an art very different from that of oratory, either in Parliament or at the Bar. Perhaps there is not in England a single man approaching the ideal of a good teacher of any of these sciences. But this difficulty would be obviated, in a few years, by the demand for such teachers; as it has been in countries in which similar institutions have been founded by the governments.

“Another difficulty is, the general indifference, in this country, about such institutions, and the general incredulity as to their utility. But this indifference and incredulity are happily giving way (however slowly); and I am convinced that the importance of such institutions, with reference to the influence and honor of the legal profession, and to the good of the country (so much depending on the character of that profession) will, before many years are over, be generally felt and acknowledged.

“Encouraging symptoms have already appeared; and there is reason to hope from these beginnings, however feeble, that the government of the country, or that the Inns of Court, will ultimately provide for law students, and for young men destined

to public life, the requisite means of an education fitting them for their high and important vocations." \*

It seems relevant here to note very briefly the movements which have taken place in regard to legal education since the date when the above considerations were put forward by the author.

The Incorporated Law Society are fairly entitled to the credit of having made the first definite movement. In 1833, soon after the date of their present charter, they established lectures for the instruction of students intended for their own branch of the profession; and in 1836, at their instance, was established a system of compulsory examination for all persons intending to be admitted as attorneys or solicitors, a system which has ever since remained in force, and with the most beneficial results.

After the failure of the attempt by the Inner Temple already mentioned, nothing appears to have been done on the part of any of the Inns of Court until 1847, when the Inner Temple established a lectureship on Common Law, while at the Middle Temple lectures were delivered upon Jurisprudence and the Civil Law, and Gray's Inn established a course of lectures followed by voluntary examinations in which the students were classed. In the year 1851, a meeting was convened of the Benchers of the four Inns of Court, with a view to the better instruction of the students, and

\* Written in the year 1834.

the result was the establishment of a Council of Legal Education, consisting of eight members, two being selected by the benchers respectively of each of the four Inns of Court, and holding their offices for two years. Regulations were also passed for providing Readers who should give lectures and hold Private Classes for the better instruction of the students; and should at stated intervals conduct an Examination of the Students. The alternative of regular attendance on the lectures or of passing the examination was imposed upon all students; a condition subsequently relaxed in the case of students who obtained a certificate of attendance for a year as pupils in the chambers of a barrister. Studentships and other encouragements were given for students who distinguished themselves in the examinations.

The attention of Parliament had been directed to legal education so long ago as 1846, when a select committee of inquiry was appointed, who made a report, observing, amongst other things, "that a system of legal education, to be of general advantage, must comprehend and meet the wants, not only of the professional, but also of the unprofessional student;" and recommending that the Inns of Court should be united into one body, so as to "form for all purposes of instruction a sort of aggregate of colleges, or in other words a species of law university."

In the year 1854 an address to the Crown was voted by the House of Commons, praying her Majesty to appoint a Commission to inquire into

the arrangements of the Inns of Court for promoting the study of the law and jurisprudence, the Revenues properly applicable and the means most likely to secure a systematic and sound education for students of law, and provide satisfactory Tests of fitness for admission to the Bar. A Royal Commission was accordingly appointed, consisting of very eminent lawyers and other competent persons. They took the evidence of a number of experienced teachers, and made inquiries from those most competent to give opinions in regard to the methods of conducting legal education pursued in England, and also in Scotland, in the principal States of Europe, and in the United States of America; and (in 1855) they made their report with the following recommendation: "We deem it advisable that there shall be established a preliminary examination for admission to the Inns of Court of persons who have not taken a university degree, and that there shall be examinations, the passing of which shall be requisite for the call to the bar; and that the four Inns of Court shall be united in one university for the purpose of these examinations, and of conferring degrees." For this purpose they proposed the heads of a scheme; as to which it need only be observed here that its scope was limited, in like manner with the commission under which they acted, to the Inns of Court and the branch of the legal profession with which they are more immediately associated.

From the time of this Report in 1855 until very recently the question of legal education in England

has slept, nor, until urged by an extraneous movement to be presently adverted to, has anything further been done by the Inns of Court, either jointly or separately.

I need hardly say that neither the voluntary classes and examinations conducted under the auspices of the Inns of Court, nor the more effective system of examinations and somewhat more animated classes of the Law Institution, satisfy the conditions of a school of law such as that propounded by Austin; nor have the results of the divided and partial efforts above mentioned been in any measure adequate to the just requirements of the public or the opportunities which the professional ability and legal knowledge concentrated in London might be made to afford for a school of law.

In this state of things a movement was set on foot which has become important. The initiative is due to some gentlemen practicing as solicitors in the provinces who felt impressed with the existing deficiency of means whereby the time spent in London by their articled clerks might be turned to account in giving them a wider and deeper knowledge of law than could be picked up in the routine of office work. These gentlemen formed themselves into an Association having for their primary object the institution of a general system of legal education which should embrace both branches of the profession. The programme was communicated to some eminent members of the bar in London, who having first insisted on the elimination of certain irrelevant topics, warmly entered into the

project; and an Association with an influential Council, representing both branches of the legal profession in London as well as in the provinces, was formed with the following objects:

1st. The establishment of a Law University for the education of students intended for the Profession of the Law.

2nd. The placing of the admission to both branches of the profession on the basis of a combined test of Collegiate Education and Examination by a Public Board of Examiners.

This Association, which adopted the name of "The Legal Education Association," obtained the invaluable services of Sir Roundell Palmer (now Lord Selborne) as their President; and thus secured at once the attention of Parliament and the public, and an able advocacy of their views. The subsequent movements of the Association have all been from time to time before the public, and I shall allude to them very briefly; but it ought to be placed on record that at the critical period of its existence the Head Center and most active exponent of the movement was a friend of Mr. Austin's: now a judge in Her Majesty's Court of Queen's Bench—Mr. Justice Quain.

The Association was formally constituted at a meeting held in July, 1870, and an Executive Committee of the Council was appointed for the transaction of business.

The specific objects of the Association as defined by the Executive Committee and adopted by sub-

sequent general meetings of the Association are as follows:—

(1.) To place the general course of studies and the examinations preliminary to and requisite for admission to the practice of the law, in all its branches, under the management and responsibility of a general school of law to be incorporated in London.

(2.) To make the passing of suitable examinations in the general school of law (or of equivalent examinations of some University of the United Kingdom) indispensable to the admission of Students to the practice of the Bar, or to practice as Special Pleaders, Certificated Conveyancers, Attorneys, or Solicitors.

(3.) To offer the benefits of the course of study and examinations to be afforded by the general school of law to all classes who may desire to take advantage of them, whether intending or not intending to follow the legal profession, in any of its branches, and whether members or not of any of the Inns of Court.

As the first step towards carrying out these objects Sir Roundell Palmer placed two resolutions on the notice paper of the House of Commons. It was then late in the session of 1870-71, and it was not until the 11th of July, 1871, that the author of the resolutions had the opportunity of bringing them to the notice of the House. His speech was received with marked attention; but owing to the advanced period of the session it was impossible

that the subject should be fully discussed by the House. To the precise terms of those Resolutions, which were settled by the President in conference with the Executive Committee of the Association, it seems here hardly necessary to refer, further than to mention that, besides the objects above mentioned, they embodied an understanding arrived at by the Executive Committee which I do not find elsewhere explicitly recorded, namely, that in the government of the proposed school of law the different branches of the legal profession in England should be "suitably represented." It may be mentioned that the designation "General School of Law," instead of "Legal University," was adopted in deference to a feeling expressed by persons representing the views of the London University.

Early in the following session of Parliament (1871-72) the following Resolutions were placed on the notice paper of the House of Commons by Sir Roundell Palmer:—

(1.) That it is desirable that a General School of Law should be established in the metropolis, by public authority, for the instruction of students intending to practice in any branch of the legal profession, and of all other subjects of Her Majesty who may desire to resort thereto.

(2.) That it is desirable, on the establishment of such school, to provide for examinations, to be held by Examiners impartially chosen, and to require certificates of the passing of such examinations as may respectively be deemed proper for the several branches of the legal profession as necessary quali-



fications (after a time to be limited) for admission to practice in those branches respectively.

In support of these Resolutions, a petition was presented signed by about 400 members of the Bar. Out of about 10,000 solicitors practicing in England and Wales, 6,000 signed petitions in favor of the Resolutions. Similar petitions were presented by the Incorporated Law Society, the Metropolitan and Provincial Law Society, and by various provincial Law Societies (including those of Liverpool, Manchester, Leeds, Birmingham, Bristol, and Plymouth) in their corporate character. Nor is it a circumstance without significance, as indicating the class who specially feel the want which the objects of the Association are calculated to meet, that Resolutions in favor of those objects were passed by the Congress of Law Students held at Birmingham in the preceding month of June. On the 1st of March, 1872, Sir Roundell Palmer introduced the motion for adopting the Resolutions, by a speech in which he entered fully into the history of the question and the arguments showing the public need of an institution such as that proposed by the the Association. The motion was supported by speeches from Mr. Spencer Walpole, Q.C., Mr. (now Baron) Amphlett, Mr. (now Mr. Justice) Denman, Mr. (now Sir William) Harcourt, Q.C., Mr. G. Osborne Morgan, Q.C. (who seconded the motion), and Mr. Thomas Hughes, Q.C.

The course taken by the Government in the debate was in effect to put in a plea for delay, on the

ground that the time of the House at their disposal was already fully mortgaged. Mr. Gladstone, while stating that the Government did not think it convenient or expedient for the House at that moment to affirm the matter contained in the Resolutions, said that "it would be a mistake to suppose that they were about to meet with rejection at the hand of the Government." Notwithstanding this intimation that for the purposes of a division the Government threw their weight into the scale against the motion, Sir Roundell Palmer determined to take the sense of the House upon it; and in a House of 219 members, 103 recorded their votes in favor of the motion, which was therefore lost by a majority of 13 only.

This was practically an end of the matter for the session of 1871-72. Before the commencement of the following session, Sir Roundell Palmer (Lord Selborne) having become Lord Chancellor, deemed it expedient to resign his office as President, although he remained a private member of the Association, and assured them of his unabated personal interest in their objects. They were also given to understand that the subject of legal education was likely before long to occupy the attention of Government. In these circumstances it was inevitable that active movement on the part of the Association should be in a measure suspended.

In the meantime an opportunity was afforded to the Inns of Court to show how far they were willing to attempt, or able to effect, the organization of a comprehensive and liberal scheme of legal educa-

tion. Urged to action by the movement from without which I have attempted to describe, they adopted a new scheme, to come into operation at the beginning of the year 1873; superseding the arrangements for teaching and examination embodied in the Consolidated Regulations of the four Inns of Court, and which were the outcome of the period of activity commenced in 1851. The new scheme creates "a permanent Committee of eight members, to be appointed by the Council of Legal Education, and to be called the 'Committee of Education and Examination.'" This Committee is, subject to the control of the Council of Legal Education, "to superintend the education and examination of students for the Bar. The scheme provides for the conduct of the work of teaching under a staff of professors and tutors to hold office at the pleasure of the Council for three years, and not longer unless re-elected, and also for examinations by a paid board of six examiners, each to hold office for not more than two years, and not to be eligible for re-election until he has been a year out of office.

Into the details of this scheme it is unnecessary to enter further. Considered as a purely Bar scheme it has merits and defects which it would be impertinent here to discuss. But I may permit myself to add one remark, and in doing so may be allowed to borrow from the Report of the Executive Committee of the Legal Education Association adopted by the Association at their annual meeting on the 10th of January, 1873, namely, that "an organization

which is confined to students for one branch of the legal profession only, which excludes the general public altogether, which keeps its administration practically in the hands of self-electing bodies claiming to be irresponsible, and which may at any moment be modified or abandoned by those bodies, entirely fails to meet the requirements of a General School of Law, open to all who wish to study law as a science, as well as to those who wish to study it with a view to professional practice, and administered by a public and responsible governing body."

It may be mentioned that the Inns of Court, after adopting their new scheme and appointing a staff to carry it out, conceded the principle of admitting the general public to the advantages of the instruction provided by them. And although under a system so organized, the concession can hardly be expected to have much practical effect, it is a strong indication of the advance of opinion within the Inns of Court in the direction of the objects advocated by the Association.

On the 12th of December, 1873, a deputation from the Association waited upon Lord Selborne (then Lord Chancellor), who informed them that he did not intend to allow more time to pass without reducing into proper form a Draft Bill which might be fit to be submitted, before the meeting of Parliament, to the then Government for their consideration. He added that in this Draft Bill he proposed not only to deal with the scheme of a General School of Law, but to endeavor at the same time to deal with the

constitution and government of the Inns of Court.

The dissolution of Parliament in the end of the year 1873, the change of government ensuing upon the general election, and the consequent late period at which Parliament met, precluded the chance of the subject of legal education being effectively dealt with last session. Lord Selborne, however, no longer trammelled by his official position as Lord Chancellor, again accepted the post of President of the Association, and as a private member of the House of Lords, at a late period of the session brought in two bills, one for the constitution of a General School of Law, and the other attempting the more difficult but inevitably connected object of dealing with the Inns of Court.

What may ultimately be the relation of the Inns of Court to legal education in this country, it would be premature to speculate; but in concluding this topic, I feel bound to remark that the views of the Association to which I have referred will not, nor will the demands of a widespread and growing conviction of the intelligent public mind, be satisfied by the establishment of a mere examining university, still less by a university or school so constituted as to rest on the Inns of Court as its sole basis.

In the above discussion of a particular object I may appear to have wandered from the proper purpose of an introduction to a course of lectures on general jurisprudence. I have not entered on the topic without deliberation; and I have judged it

due both to the memory of Austin and to the objects which he thought desirable, to trace and record the connection between the views so earnestly insisted on by him, and those which through the association of numbers and the most eminent advocacy are now able to command the attention of Parliament and of the Government of the day.

I must here mention that in the final revision of the sheets for the press I am indebted to the suggestions of my friend Mr. W. Payne, of this Inn; and for general help in carrying the work through the press and in compilation of the index I have to acknowledge my obligations to an able assistant, Mr. Walter Clift.

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*Lincoln's Inn.*

LAW COURT CHAMBERS, 33 Chancery Lane;  
*December, 1874.*

# CONTENTS.

	PAGE
INTRODUCTION (by the Editor) . . . . .	v
BRIEF OUTLINE OF THE COURSE . . . . .	lv
THE SAME IN A TABULAR FORM . . . . .	lvi

## PART I.—DEFINITIONS.

### DIVISION I.—THE PROVINCE OF JURISPRUDENCE DETERMINED. LECTURE

Analysis of Lectures I.—VI. . . . .	3
I. Essentials of a Law, properly so called . . . . .	12
II. The Distinguishing Characters of Divine Law, revealed and unrevealed. Diverse Hypotheses as to the index to Divine Laws of the latter class . . . . .	25
III. Continuation of the same topic . . . . .	43
IV. The same topic further continued . . . . .	57
V. Distinguishing characters of Positive Moral Laws or Rules; and of Laws so called by a figure of speech . . . . .	81
VI. Final definition of <i>Positive Law</i> , with the implicated terms <i>Sovereignty</i> and <i>Independent Political Society</i> . . . . .	116

### DIVISION II.—GENERAL AND PARTICULAR JURISPRUDENCE.

XI. On General as distinguished from Particular Jurisprudence	210
---	-----

### DIVISION III.—ANALYSIS OF PERVADING NOTIONS.

XII. Analysis of the term "Right" (commenced) . . . . .	228
XIII. " <i>Things</i> " and their relation to "Rights" . . . . .	237

LECTURE	PAGE
XIV. "Act" and "Forbearance." <i>Jus in rem—in personam</i>	248
XV. <i>Jus in rem—in personam</i> (continued) . . . . .	267
XVI. Rights considered generally . . . . .	275
XVII. Absolute and relative duties . . . . .	278
XVIII. "Will" and "Motive" . . . . .	284
XIX. "Intention" . . . . .	291
XX. "Negligence," "Heedlessness," and "Rashness" . . . . .	297
XXI. "Intention" further considered . . . . .	304
XXII. "Sanction" . . . . .	311
XXIII. <i>Physical Compulsion</i> distinguished from <i>Sanction</i> . . . . .	317
XXIV. "Injury" or "Wrong," "Guilt," "Imputability" . . . . .	320
XXV. Analysis of "Injury" or "Wrong" continued. Grounds of Non-imputability . . . . .	329
XXVI. Grounds of Non-imputability. Digression on <i>Presump-</i> <i>tions</i> . . . . .	345
XXVII. Different kinds of Sanctions . . . . .	357



## PART 1.

### DEFINITIONS.

	LECTURE
The province of Jurisprudence determined, . . .	I-VI.
General jurisprudence distinguished from particular, . . .	XI.
Analyses of certain notions which pervade the science of law, . . . . .	XII.-XXVII.

# THE FOREGOING ABSTRACT IN A TABULAR FORM.

## DEFINITIONS.

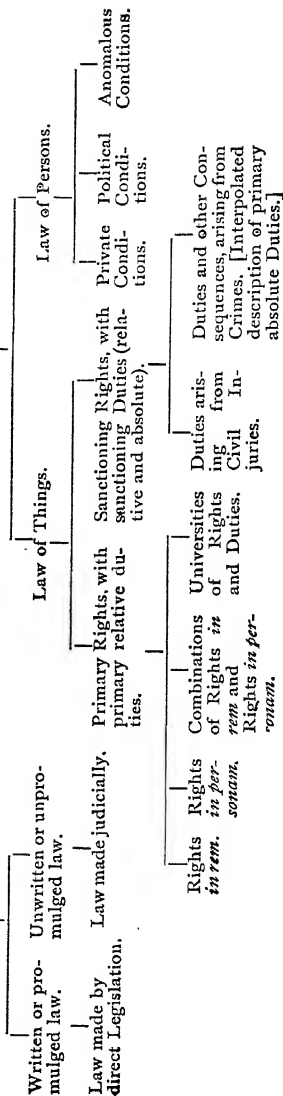
(LECTURES I.-XXVII.)

Law considered with reference to its sources, and to the modes in which it begins and ends.

(LECTURES XXVIII.-XXXIX.)

Law considered with reference to its purposes, and to the subjects about which it is conversant.

(LECTURE XL., &c.)



LECTURES  
ON  
JURISPRUDENCE.

*PART I.—DEFINITIONS.*



## DIVISION I.

### THE PROVINCE OF JURISPRUDENCE DETERMINED.

*Introductory. — Purpose and Method of the  
Six Ensuing Lectures.*

1. THE matter of Jurisprudence is positive law : law strictly so called, that is, law set by political superiors to political inferiors. But since by the word law are also denoted, properly and improperly, other objects related to positive law by resemblance or analogy, it is first necessary to distinguish positive law from those various related objects ; in other words, to determine the province of jurisprudence.

2. A law, in the literal and proper sense of the word, may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. This definition seems to embrace all the objects to which the word can be applied without extension of its meaning by metaphor or analogy, and in this sense law comprises

Laws set by God to men, and

Laws set by men to men.

3. *Laws set by God to men.*—To the whole or a portion of these has been sometimes applied the phrase, Law of Nature, or Natural Law. The phrase is also frequently applied to other objects which ought to be broadly distinguished. Rejecting it, accordingly, as ambiguous and misleading, I designate these laws, considered collectively, by the term Law of God.

4. *Laws set by men to men.*—Of these, first, some are established by political superiors acting as such, and are here collectively marked by the name of positive law—the appropriate matter of jurisprudence; secondly, others are set by men not political superiors, or not acting as such:

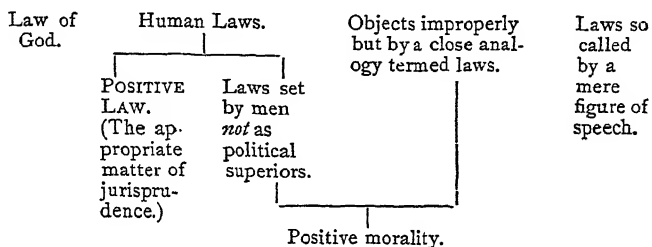
5. Closely analogous to human laws of this second class, are a set of objects frequently but improperly termed laws, being rules set and enforced merely by the opinion of an intermediate body of men; *e. g.*, where the word law is used in such expressions as “the law of honor,” the “laws of fashion.” Rules of this species constitute much of what is usually termed “International Law.”

6. Human laws of the second class above mentioned (*i. e.*, those set by men not as political superiors), with the objects improperly, but by close analogy, termed laws, I place together in a common class under the term positive morality. The name morality severs them from positive law; while the epithet positive disjoins them from the law of God, marking the distinction between morality according to the rules and opinions actually prevailing among men, and morality conceived of as conforming to the law of God.

7. There are numerous applications of the term law, which rest upon a slender analogy, and are merely metaphorical. Such is the case when we talk of laws observed by the lower animals, of laws regulating the growth of vegetables, or determining the movements of inanimate bodies or masses. Intelligence is of the essence of law, and where intelligence is not, or is of a kind too limited to take the name of reason, the word law can only be applied by a figure of speech. By using the word law in the figurative sense, and then ignoring the circumstance that the use of the word was merely figurative, a deluge of muddy speculation has been introduced into the field

of jurisprudence and morals. In this respect the phrase, "Law of Nature" (*jus naturale*), has much to answer for.

The following table illustrates the division and relations between the several objects indicated :



8. Laws properly so called, with laws improperly so called, may accordingly be divided into the four following kinds :

1. The divine laws, or the laws of God ; that is to say, the laws which are set by God to his human creatures.
2. Positive laws ; that is to say, laws which are simply and strictly so called, and which form the appropriate matter of general and particular jurisprudence.
3. Positive morality, rules of positive morality, or positive moral rules.
4. Laws metaphorical or figurative, or merely metaphorical or figurative.

Positive laws (the appropriate matter of jurisprudence) are therefore related in the way of resemblance or by close or remote analogies to the following objects. 1. In the way of resemblance they are related to the laws of God. 2. In the way of resemblance they are related to those rules of positive morality which are laws properly so called. And by a close or strong analogy they are related to those rules of positive morality which are laws

set by opinion. 3. By a remote or slender analogy they are related to laws figuratively so called.

The leading purpose of the first part of this work is to distinguish positive laws (the appropriate matter of jurisprudence) from the objects lastly above enumerated: objects with which they are often confounded in consequence of the resemblance and analogies above mentioned, and of the common name of "laws" being applied to all. The first part of this work is accordingly entitled "The Province of Jurisprudence Determined," and its purpose is to describe the boundary which severs that province from the regions lying on its confines.

9. The method I adopt for accomplishing this purpose may be shortly stated as follows:—

I. I determine the essence common to all laws properly so called: in other words, I determine the essence of a law imperative and proper.

II. I determine the respective characters of the four several classes into which laws (proper and otherwise) may be divided, assigning to each class the appropriate marks by which laws of that class are distinguished from laws of the others.

It is convenient to treat these classes in the following order:

- (a) *Laws of God.*
- (b) *Positive Morality.*
- (c) *Laws in a figurative sense.*
- (d) POSITIVE LAWS.

By determining the essence or nature of a law imperative and proper, and the respective characters of those four several classes, I determine positively and negatively the appropriate matter of jurisprudence. I determine positively what that matter is; and I distinguish it from various objects which are variously related to it, and with which it is apt to be confounded. I show,



moreover, its affinities with those various related objects: affinities that ought to be conceived precisely and clearly, as there are numerous portions of the *rationalis* of positive law to which they are the key.

10. Having suggested the purpose of that portion of the work contained in the ensuing six lectures, I now will indicate the topics embraced therein, and also the order in which those topics are presented to the reader.

11. I. In the first of the six lectures which immediately follow, I state the essentials of a law or rule (taken with the largest signification that can be given to the term properly). In other words, I determine the essence common to all laws properly so called.

Determining the essence of a law imperative and proper, I determine implicitly the essence of a command; and I distinguish commands which are laws from occasional or particular commands. Determining the nature of a command, I fix the meanings of the terms implied by "command"; namely, "sanction" or "enforcement of obedience"; "duty" or "obligation"; "superior and inferior."

12. II. (a) In the beginning of the second lecture, I briefly determine the characters by which the laws of God are distinguished from other laws; and I divide the laws and other commands of the Deity into two kinds: the revealed or express, and the unrevealed or tacit.

13. I then pass to the nature of the signs or index through which commands of the latter kind are manifested to Man. Now, concerning the nature of the index to the tacit commands of the Deity, there are three hypotheses: First, the pure hypothesis of general utility; secondly, the pure hypothesis of a moral sense; thirdly, a hypothesis mixed or compounded of the others. And with a statement and explanation of these

three hypotheses, the greater portion of the second lecture, and the whole of the third and fourth lectures, are occupied.

14. That exposition of the three hypotheses or theories, if apparently impertinent to my subject, is yet a necessary link in the chain of systematic lectures expounding the principles of jurisprudence. Of those principles, both as regards their essential character, and as they are expressed in the writings of jurists, there are many which could not be expounded correctly and clearly, if the three hypotheses or theories had not been previously expounded. For example: Positive law and morality are distinguished by modern jurists into law natural and law positive; and this distinction nearly tallies with one which pervades the Pandects and Institutes, and which was taken by their compilers from the jurists who are styled "classical." By the "classical" jurists (of excerpts from whose writings the Pandects are mainly composed), *jus civile* is distinguished from *jus gentium*, or *jus omnium gentium*. For (say they) a portion of the positive law which obtains in a particular nation, is peculiar to that community: and may be styled *jus civile*, or *jus proprium ipsius civitatis*. But there are other rules of positive law which obtain in all nations, and there are rules of positive morality which all mankind observe: and since these legal rules obtain in all nations, and these moral rules are observed by all mankind, they may be styled the *jus omnium gentium*, or the *commune omnium hominum jus*. Now these rules, being universal, can not be purely or simply of human invention and position. More probably are they fashioned by men on laws coming from God, or from the intelligent and rational Nature which is the soul and the guide of the universe. But the legal and moral rules which are peculiar to particular nations, are purely or simply of

human invention and position. Inasmuch as they are partial and transient, and not universal or enduring, they can hardly be fashioned by their human authors on divine or natural models. Now, without a previous knowledge of the three hypotheses in question, the worth of the two distinctions to which I have briefly alluded, can not be known correctly, or estimated truly. Assuming the pure hypothesis of a moral sense, or assuming the pure hypothesis of general utility, those distinctions are purposeless and idle subtilties. But, assuming the hypothesis compounded of the others, those distinctions are significant, and are also of considerable moment.

Besides, the divine law is the measure or test of positive law and morality. That is to say, law and morality, in so far as they are what ought to be, conform, or are not repugnant, to the law of God. Consequently, an all-important object of the science of ethics (or, borrowing the language of Bentham, "the science of deontology") is to determine the nature of the index to the tacit commands of the Deity, or the nature of the signs or proofs through which those commands may be known. I mean by "the science of ethics" (or by the "science of deontology,") the science of law and morality as they respectively ought to be; as they respectively must be if they conform to their measure or test. That department of the science of ethics, which is concerned with positive law as it ought to be, is styled the science of legislation; that which is concerned with positive morality as it ought to be, has not an appropriate name. Now, though the science of legislation (or of positive law as it ought to be), is not the science of jurisprudence (or of positive law as it is), still the sciences are connected by numerous and indissoluble ties. Since, then, the nature of the index to the tacit commands of the Deity is an all-important object of the science of legisla-

tion, it is a fit and important object of the kindred science of jurisprudence.

Deeply convinced of the truth and importance of the theory of general utility, I depart in some degree from my strict course in order to rectify certain current misconceptions of the theory; to answer certain objections resting on those misconceptions; and to solve or extenuate difficulties with which the theory is really embarrassed.

15. (b) At the beginning of the fifth lecture, I distribute laws or rules under two classes: First, laws properly so called, with such improper laws as are closely analogous to the proper; secondly, those improper laws which are remotely analogous to the proper, and which I style, therefore, laws metaphorical or figurative. I also distribute laws proper, with such improper laws as are closely analogous to the proper, under three classes, namely, the laws properly so called which I style the laws of God; the laws properly so called which I style positive laws; and the laws properly so called, with the laws improperly so called, which I style positive morality or positive moral rules. I assign, moreover, my reasons for marking those several classes with those respective names.

Having determined, in preceding lectures, the characters or distinguishing marks of the divine laws, I determine, in the fifth lecture, the characters or distinguishing marks of positive moral rules: that is to say, such of the laws or rules set by men to men as are not armed with legal sanctions. Having determined the distinguishing marks of positive moral rules, I determine the respective characters of their two dissimilar kinds; namely, those which are laws imperative and proper, and those which are laws set by opinion.

The divine law, positive law, and positive morality, are mutually related in various ways. I advert, in the

fifth lecture, to the cases wherein they agree, wherein they disagree without conflicting, and wherein they disagree and conflict.

I show, in the same lecture, that my distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies, in the main, with a division of laws which is given incidentally by Locke in his "Essay on Human Understanding."

16. (c) At the end of the same lecture, I determine the characters or distinguishing marks of laws metaphorical or figurative. And I show that laws which are merely laws by a figure of speech, are blended and confounded by writers of celebrity, with laws imperative and proper.

17. (d) In the sixth and last lecture, I determine the characters of laws positive; that is to say, laws which are simply and strictly so called, and which form the appropriate matter of general and particular jurisprudence.

18. Herein I determine implicitly the notion of sovereignty, with the implied or correlative notion of independent political society. For the essential difference of a positive law may be stated generally in the following manner: Every positive law, or every law strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.

To elucidate the nature of sovereignty, and of the independent political society that sovereignty implies, I examine various topics which I arrange under the following heads: First, the possible forms or shapes of supreme political government; secondly, the limits, real or imaginary, of supreme political power; thirdly, the origin or causes of political government and society. Examining

those various topics, I complete my description of the limit or boundary by which positive law is severed from positive morality. For I distinguish them at certain points where the line of demarcation is not easily perceptible.

The essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated generally as I have stated it above. But this general statement is open to certain correctives. And with a brief allusion to those correctives, I close the sixth lecture.

## LECTURE I.

19. In pursuance of the purpose above sketched out, I proceed, in the first place, to state the essentials of a law properly so called.

Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands.

20. Now, since the term command comprises the term law, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analyzed with precision.

Accordingly, I shall endeavor, in the first instance, to analyze the meaning of "command;" an analysis which is necessarily difficult, and involves circumlocution in proportion as the term to be explained is simple.

21. If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. A command

is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you can not or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. "*Preces erant, sed quibus contradici non posset.*" Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.\*

22. Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it.

23. Command and duty are, therefore, correlative terms; the meaning denoted by each being implied or supposed by the other. Wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

24. The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a sanction. The command or the duty is said to be sanctioned by the chance of incurring the evil. Some sanctions are called punishments.

25. Paley, in his analysis of the term obligation, lays much stress upon the violence of the motive to compliance. His meaning appears to be that unless the motive to compliance be violent or intense, the expression of a

\* Of a similar nature would be a request or advice tendered by a British resident to the reigning personage in a (so-called) independent state in India.—R. C.

wish is not a command, nor does it place the person to whom it is directed under a duty.

But in truth the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there is a sanction, and, therefore, a duty and a command.

26. By Locke and Bentham, the term sanction or enforcement of obedience, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for these names, I think this extension of the term pregnant with confusion.

Rewards are, indisputably, motives to comply with the wishes of others. But to talk of commands and duties as sanctioned or enforced by rewards, is surely a wide departure from the established meaning of the terms. If you expressed a desire that I should render a service, and proffered a reward as the inducement to render it, you would scarcely be said to command the service, nor should I, in ordinary language, be obliged to render it.

If we put reward into the import of the term sanction, we must engage in a toilsome and probably unsuccessful struggle with the current of ordinary speech.

27. The ideas, then, comprehended by the term command are the following: 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply



not with the wish. 3. An expression or intimation of the wish by words or other signs.

28. It appears from what has been premised, that command, duty, and sanction are inseparably connected terms; that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

"A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded," are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion. But they differ in this, that the word "command" points directly and prominently to the wish expressed by the one; the word "duty" to the chance of meeting the evil incurred by the other; the word "sanction" to the evil itself; each expression referring less directly and prominently to the remaining notions.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath,—Each of the three terms signifies the same notion; but each denotes a different part of that notion, and connotes the residue.

29. Commands are of two species. Some are laws or rules. The others have not acquired an appropriate name, nor is there any short expression which will mark them precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of "occasional or particular commands." The distinction may, I think, be stated in the following manner:

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or for-

bearances specifically or individually, a command is occasional or particular.

For instance, if you command your servant to go on a given errand, or not to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specifically determined or assigned.

But if you command him simply to rise at that hour, or to rise at that hour always, or till further orders, it may be said, with propriety, that you lay down a rule for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders would be called a general order, and might be called a rule.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule; a kind or sort of acts being determined by the command, and acts of that kind or sort being generally forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn then shipped and in port, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

Again; an act which is not an offense, according to

the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

To conclude with an appropriate example, judicial commands are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver, is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment as the consequence of a specific offense.

The distinction immediately above stated and illustrated, does not indeed accurately square with established forms of speech. For instance, an order by Parliament, stopping the exportation of corn then in port, would very likely be called a law because it wears the form of law, and is issued by the sovereign legislature. An act of attainder deliberately passed by a Parliament, with the forms of legislation, would probably be called a law, though a similar order made by a sovereign monarch, without deliberation or ceremony, would be styled an arbitrary command. And on the other hand, there are many commands issued by way of delegated

legislation, which really are laws, although not called so by common language. Such are various Orders in Council, Orders issued by Public Departments, Schemes of the Charity Commissioners when duly laid before Parliament, Orders or "Rules" made under powers given in Acts of Parliament relating to Judicial Procedure, or otherwise made in exercise of delegated legislative functions.

30. According to the line of separation which I have attempted to describe, a law and a particular command are distinguished thus: Acts or forbearances of a class are enjoined generally by the former. Acts determined specifically, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to them, a law and a particular command are distinguished in the following manner: A law obliges generally the members of the given community, or persons of a given class. A particular command obliges a single person, or persons individually.

This is not a correct account of the distinction.

For, first, commands which oblige generally the members of the given community, or persons of given classes, are not always laws or rules.

Thus, in the case already supposed—that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained—the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law.

And, secondly, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or rule.

For example, a father may set a rule to his child or children: a guardian, to his ward: a master, to his slave

or servant. And certain of God's laws were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Again suppose that Parliament creates and grants an office, and binds the grantee to services of a given description, this would be a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that name, like most of the leading terms in actual systems of law, is equally applied to a heap of heterogeneous objects.\*

31. A law, properly so called, is therefore a command which obliges a person or persons; and as distinguished from a particular or occasional command, obliges generally to acts or forbearances of a class.

32. Laws and other commands are said to proceed from superiors, and to bind or oblige inferiors. I will, therefore, analyze the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with precedence or excellence; as for instance when we talk of superiors in rank, wealth, or virtue.

But, taken with the meaning wherein I here understand it, the term superiority signifies might: the power

\* Where a *privilegium* merely imposes a duty, it exclusively obliges a determinate person or persons. But where a *privilegium* confers a right, and the right conferred avails against the world at large, the law is *privilegium* as viewed from a certain aspect, but is also a general law as viewed from another aspect. In respect of the right conferred, the law exclusively regards a determinate person, and, therefore, is *privilegium*. In respect of the duty imposed, and corresponding to the right conferred, the law regards generally the members of the entire community.

of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is emphatically the superior of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen; the master, of the slave or servant; the father, of the child.

In short, whoever can oblige another to comply with his wishes, is the superior of that other, so far as the ability reaches: That other being, to the same extent, the inferior.

The might or superiority of God is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. The party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example: To an indefinite, though limited extent, the monarch is the superior of the governed; his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch; who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge; the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term superiority (like the terms duty and sanction) is implied by the term com-

mand : and therefore "that laws emanate from superiors" is an identical proposition. The meaning which it affects to impart is contained in its subject.

33. I must now advert to certain objects improperly called laws, not being commands, which may nevertheless be properly included within the province of jurisprudence, namely :

1. Acts on the part of legislatures to explain positive law. Working no change in the actual duties of the governed, but simply declaring what those duties are ; they are not commands, but, to borrow an expression from the writers on Roman law, acts of authentic interpretation. And though they are not laws properly so called, they are so intimately connected with positive law as to come within the province of jurisprudence.

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect ; Legislative, like judicial interpretation, being frequently deceptive ; and establishing new law under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties. In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. These are often named "permissive" laws.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights\* and duties answering those rights are, therefore, created or revived.

But this is a matter which I shall examine with exactness when I analyze the expressions "legal right," "permission by the sovereign or state," and "civil or political liberty."

3. Imperfect laws, or laws of imperfect obligation

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example. An imperfect law is not so properly a law, as counsel or exhortation addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

Many of the writers on morals, and on the so-called laws of nature, have annexed a different meaning to the term imperfect. Speaking of imperfect obligations, they commonly mean duties which are not legal; duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term imperfect denotes simply that the law wants the sanction appropriate to laws of the kind. An imperfect obligation in the other meaning of the expression is a religious or a moral obligation.

34. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so-called laws set by opinion and the objects metaphorically termed laws, are the only laws



which really are not commands, there are certain (properly so called) which may seem not imperative. subjoin a few remarks upon laws of this dubious character.

35. First it may be said that there are laws which merely create rights: And seeing that every command imposes a duty, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws merely creating rights. There are laws, it is true, which merely create duties; duties not correlating with correlative rights, and which therefore may be styled absolute. But every law really conferring a right, imposes expressly or tacitly a relative duty, or a duty correlating with the right. This will more clearly appear when I come hereafter to analyze the expression "rights."

Secondly, according to an opinion which I must notice incidentally here, though the subject to which it relates will be treated directly hereafter, customary laws are an exception to the proposition "that laws are a species of commands."

36. By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state) because the citizens or subjects have observed or kept them. Agreeably to this opinion, they are positive law (or law, strictly so called) inasmuch as they are enforced by the courts of justice; but exist as positive law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. And consequently customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party which is strongly opposed to customary law, and to all law

made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law is purely the creature of the judges by whom it is established immediately. To suppose that it speaks the legislative will of the sovereign, is one of the foolish or knavish fictions with which lawyers in every age and nation have perplexed the simplest truths.

It can easily be shown that each of these opinions is groundless; that customary law is imperative in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law when it is adopted as such, either by being expressly embodied in statutes promulgated by the sovereign authority, or implicitly by decisions of the courts of justice which are enforced by the power of the state.

For the legal rule introduced by a judicial decision (whether suggested by custom or not) is in effect legislation by the sovereign. A subordinate or subject judge is merely a minister. The rules which he makes derive their legal force from authority given by the state; an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence.

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by words (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are not words), the command is tacit.

Now when customs are turned into legal rules by

decisions of subject judges, the legal rules which emerge from the customs are tacit commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them; and it therefore signifies its pleasure, by that its voluntary acquiescence, "that they shall serve as a law to the governed."

It appears, then, that the positive law styled customary, as well as all positive law made judicially, is established by the state, directly or circuitously, and therefore is imperative; although it is true that law made judicially and law made by statute are distinguished by weighty differences; and into the nature and reasons of these I shall inquire hereafter.

37. I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following: 1. Declaratory laws, or laws explaining the import of existing positive law. 2. Laws abrogating or repealing existing positive law. 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or, in other words, I shall limit the term law to laws which are imperative, unless I extend it expressly to laws which are not.

## LECTURE II.

38. Having stated the essentials of a law or rule (taken with the largest signification which can be given to the term properly), I now proceed, according to the purpose and method above sketched out, to distinguish the

characters of the four different kinds or classes of laws (properly and improperly so called), in the order enumerated on p. 6 above.

39. (a) The Divine laws, or the laws of God, are laws set by God to his human creatures. As I have intimated already, and shall show more fully hereafter, they are laws or rules, properly so called.

As distinguished from duties imposed by human laws, duties imposed by the Divine laws may be called religious duties. Violations of religious duties are styled sins.

As distinguished from sanctions annexed to human laws, the sanctions annexed to the Divine laws may be called religious sanctions. They consist of the evils or pains which we may suffer here or hereafter by the immediate appointment of God, and as consequences of breaking his commandments.

40. Of the Divine laws, or the laws of God, some are revealed or promulgated, others unrevealed. Those which are unrevealed are not unfrequently denoted by the phrases; "law] of nature;" "natural law;" "the law manifested to man by the light of nature or reason;" "the laws, precepts, or dictates of natural religion."

The revealed law of God, and the portion of the law of God which is unrevealed, are manifested to men in different ways, or by different sets of signs.

41. With regard to the laws which God is pleased to reveal, the way wherein they are manifested is easily conceived. They are express commands; portions of the word of God; commands signified to men through the medium of human language; and uttered by God directly, or by servants whom he sends to announce them.

42. Such of the Divine laws as are unrevealed are laws set by God to his human creatures, but not through the medium of human language, or not expressly.

43. These are the only laws which he has set to that portion of mankind who are excluded from the light of Revelation.

These laws are binding upon us (who have access to the truths of Revelation), in so far as the revealed law has left our duties undetermined. For, though his express declarations are the clearest evidence of his will, we must look for many of the duties, which God has imposed upon us, to the marks or signs of his pleasure which are styled the light of nature. Paley and other divines have proved beyond a doubt, that it was not the purpose of Revelation to disclose the whole of those duties. Some we could not know, without the help of Revelation, and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature or reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.

44. But if God has given us laws which he has not revealed or promulgated, how shall we know them? What are those signs of his pleasure, which we style the light of nature; and oppose, by that figurative phrase, to express declarations of his will?

45. The hypotheses or theories which attempt to resolve this question, may be reduced, I think, to two.

46. According to one of them, there are human actions which all mankind approve, human actions which all men disapprove; and these universal sentiments arise at the thought of those actions, spontaneously, instantly, and inevitably. Being common to all mankind, and inseparable from the thoughts of those actions, these sentiments are marks or signs of the Divine pleasure. They are proofs that the actions which excite them are enjoined or forbidden by the Deity.

47. The rectitude or pravity of human conduct, or its

agreement or disagreement with the laws of God, is instantly inferred from these sentiments, without the possibility of mistake. He has resolved that our happiness shall depend on our keeping his commandments; and it manifestly consists with his manifest wisdom and goodness, that we should know them promptly and certainly. Accordingly, he has not committed us to the guidance of our slow and fallible reason. He has wisely endowed us with feelings, which warn us at every step; and pursue us, with their importunate reproaches, when we wander from the path of our duties.

48. These simple or inscrutable feelings have been compared to those which we derive from the outward senses, and have been referred to a peculiar faculty called the moral sense; though, admitting that the feelings exist, and are proofs of the Divine pleasure, I am unable to discover the analogy which suggested the comparison and the name. The objects or appearances which properly are perceived through the senses, are perceived immediately, or without an inference of the understanding. According to the hypothesis which I have briefly stated or suggested, there is always an inference of the understanding, though the inference is short and inevitable. From feelings which arise within us when we think of certain actions, we infer that those actions are enjoined or forbidden by the Deity.

The hypothesis of a moral sense has been expressed by various terms; by the term common sense in relation to mankind in general; conscience in relation to the individual. And the laws of God to which these feelings are supposed to be the index have been styled innate practical principles.

49. According to the other of the adverse theories or hypotheses, the laws of God, which are not revealed or promulgated, must be gathered by man from the good-

ness of God, and from the tendencies of human actions. In other words, the benevolence of God, with the principle of general utility, is our only index or guide to his unrevealed law.

50. God designs the happiness of all his sentient creatures. Some human actions forward that benevolent purpose, or their tendencies are beneficent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting his purpose, God has enjoined. The latter, as opposed to his purpose, God has forbidden. He has given us the faculty of observing; of remembering; of reasoning; and, by duly applying those faculties, we may collect the tendencies of our actions. Knowing the tendencies of our actions, and knowing his benevolent purpose, we know his tacit commands.

51. Such is a brief summary of this celebrated theory. I should wander to a measureless distance from the main purpose of my lectures, if I stated all the explanations with which that summary must be received. But, to obviate the principal misconceptions to which the theory is obnoxious, I will subjoin as many of those explanations as my purpose and limits will admit.

The theory is this:—Inasmuch as the goodness of God is boundless and impartial, he designs the greatest happiness of all his sentient creatures. From the tendencies of human actions to increase or diminish the aggregate of human enjoyments, we may infer the laws which he has given, but has not expressed or revealed.

52. Now the tendency of a human action thus understood is the whole of its tendency; the sum of its probable consequences, remote and collateral, as well as direct, in so far as they may influence the general happiness.

Trying to collect its tendency (as thus understood), we must not consider the action as if it were single and in-

sulated, but must look at the class of actions to which it belongs. The question is this:—If acts of the class were generally done, or generally forborne or omitted, what would be the probable effect on the general happiness or good?

Considered by itself, a mischievous act may seem to be useful or harmless. Considered by itself, a useful act may seem to be pernicious.

For example, If a poor man steal a handful from the heap of his rich neighbor, the act, considered by itself, is harmless or positively good. One man's poverty is assuaged with the superfluous wealth of another.

But suppose that thefts were general (or that the useful right of property were open to frequent invasions), and mark the result.

Without security for property, there were no inducement to save. Without habitual saving on the part of proprietors, there were no accumulation of capital. Without accumulation of capital, there were no fund for the payment of wages, no division of labor, no elaborate and costly machines; there were none of those helps to labor which augment its productive power, and, therefore, multiply the enjoyments of every individual in the community. Frequent invasions of property would bring the rich to poverty, and aggravate the poverty of the poor.

Again: If I evade the payment of a tax imposed by a good government, the specific effects of the mischievous forbearance are indisputably useful. For the money which I unduly withhold is convenient to myself; and, compared with the bulk of the public revenue, is a quantity too small to be missed. But the regular payment of taxes is necessary to the existence of the government. And I, and the rest of the community, enjoy the security which it gives, because the payment of taxes is rarely evaded.



In the cases now supposed, the act or omission is good, considered as single or insulated; but, considered with the rest of its class, is evil. In other cases, an act or omission is evil, considered as single or insulated; but, considered with the rest of its class, is good.

For example, A punishment, as a solitary fact, is an evil; the pain inflicted on a criminal being added to the mischief of the crime. But considered as part of a system, a punishment is useful or beneficent. By a dozen or score of punishments, thousands of crimes are prevented. With the sufferings of the guilty few, the security of the many is purchased. By the lopping of a peccant member, the body is saved from decay.

53. If the tendencies of actions considered in the light above mentioned be the index to the will of God, it follows that most of his commands are general or universal. The useful acts which he enjoins, and the pernicious acts which he prohibits, he enjoins or prohibits, for the most part, not singly, but by classes; not by commands which are particular, or directed to insulated cases; but by laws or rules which are general, and commonly inflexible.

For example, Certain acts are pernicious, considered as a class; while such are the motives or inducements to the commission of acts of the class, that unless we were determined to forbearance by the fear of punishment, they would be frequently committed. If we combine these data with the wisdom and goodness of God, we must infer that he forbids such acts without exception. In the tenth, or the hundredth case, the act might be useful in the nine, or the ninety-and-nine, the act would be pernicious. If the act were permitted or tolerated in the rare and anomalous case, the motives to forbear in the others would be weakened or destroyed. In the hurry and tumult of action it is hard to distinguish justly. To grasp at present enjoyment, and to turn from present un-

easiness, is the habitual inclination of us all. And thus through the weakness of our judgments, and the more dangerous infirmity of our wills, we should frequently stretch the exception to cases embraced by the rule.

Consequently, where acts, considered as a class, are useful or pernicious, we must conclude that he enjoins or forbids them, and by a rule which probably is inflexible.

54. Such, I say, is the conclusion at which we must arrive, supposing that the fear of punishment be necessary to incite or restrain. This is not the case in regard to all kinds of actions. To some useful acts we are sufficiently prone, and from some mischievous acts sufficiently averse without the motives which are presented to the will by a lawgiver. Motives natural or spontaneous impel us to action in the one case, and hold us to forbearance in the other. In the language of Mr. Locke, "The mischievous omission or action would bring down evils upon us, which are its natural products or consequences; and which, as natural inconveniences, operate without a law."

55. Now, if the ordinary measure or test of trying the tendencies of our actions be that above explained, the most current and specious of the objections which are made to the theory of utility, is founded in gross mistake, and is open to triumphant refutation.

That objection may be stated thus:

"Pleasure and pain (or good and evil) are inseparably connected. Every act and forbearance is followed by both; immediately or remotely, to ourselves or to our fellow-creatures.

"Consequently, if we shape our conduct justly to the principle of general utility, every election which we make between doing or forbearing from an act will be preceded by the following process. First: We shall conjecture the consequences of the act, and also the con-

sequences of the forbearance. Secondly: We shall compare the consequences of the act with the consequences of the forbearance, and determine the balance of advantage.

"Now suppose we actually tried this process before arriving at our resolves. Mark the absurd and mischievous effects which would inevitably follow.

"Generally speaking, the period allowed for deliberation is brief: and to lengthen deliberation beyond that limited period is equivalent to forbearance or omission. Consequently, if we performed this process completely, we should often defeat its purpose. But feeling the necessity of resolving promptly, we should not perform the process completely or correctly. We should guess or conjecture hastily the effects of the act and the forbearance, and compare their respective effects with equal precipitancy. Our premises would be false or imperfect; our conclusions, badly deduced. Laboring to adjust our conduct to the principle of general utility, we should work inevitable mischief.

"And such would be the consequences of following the principle of utility, though we sought the true and the useful with simplicity and in earnest. But, as we commonly prefer our own interests to those of our fellow-creatures, and our own immediate to our own remote interests, it is clear that we should warp the principle to selfish and hurtful ends."

Such, I believe is the meaning of those—if they have a meaning—who object to the principle of utility "that it is a dangerous principle of conduct."

56. It has been said, in answer to this objection, that it involves a contradiction in terms. Danger is another name for probable mischief: And, surely, we best avert the probable mischiefs of our conduct, by estimating its probable consequences. To say "that the principle of

utility is a dangerous principle of conduct," is to say "that it is contrary to utility to consult utility."

Now, though this is so brief and pithy that I heartily wish it were conclusive, I must admit that it scarcely touches the objection. For the objection assumes that we can not foresee and estimate the probable effects of our conduct: and the argument is that by the attempt at calculation, which would inevitably fail, we should fall into error and sin, and so deviate from the principle of utility by which we professed to be guided. A proposition involving when fairly stated nothing like a contradiction.

But, though this is not the refutation, there is a refutation.

57. And first, If utility be our only index to the tacit commands of the Deity, it is idle to object its imperfections. We must even make the most of it.

If man were endowed with a moral sense, or in other words were gifted with a peculiar organ for acquiring a knowledge of the duties imposed upon him by the Deity, these would be subjects of immediate consciousness, and an attempt to displace that invincible consciousness by the principle of utility would be impossible, and manifestly absurd. - But, if we are not gifted with that peculiar organ, we must gather our duties, as best we can, from the tendencies of human actions; or remain at our own peril, in ignorance of our duties.

58. Before stating the second answer to the objection I must observe that the objectors misunderstand the theory which they impugn. They assume that, if we adjusted our conduct to the principle of general utility, every election which we made between doing and forbearing from an act would be preceded by a calculation; by an attempt to conjecture and compare the respective probable consequences of action and forbearance.

And, granting their assumption, I grant their inference. I grant that the principle of utility were a halting and purblind guide.

But their assumption is groundless. For, according to that theory, our conduct would conform to rules inferred from the tendencies of actions, but would not be determined by a direct resort to the principle of general utility. Utility would be the test of our conduct ultimately, but not immediately: the immediate test of the rules to which our conduct would conform, but not the immediate test of specific or individual actions. Our rules would be fashioned on utility; our conduct, on our rules.

59. The second answer to the objection consists merely in a reiteration of the explanations of the theory already advanced, and the deduction of some necessary conclusions.

60. The whole tendency of an act,—the sum of its probable results in all their infinite ramifications,—can only be measured by supposing that acts of the kind were largely practiced, and considering the probable result. The total is often capable of a direct estimation, for which, if we regard only the individual act, there are no certain data. Thus we arrive at a means for testing the quality of the individual act.

The question therefore is what would be the probable effect upon the general happiness or good, if acts of the class were generally done or forborne. If the balance of advantage or disadvantage lie on the positive side, the tendency of the act is good; the general happiness requires that acts of the class shall be done. If it lie on the negative side, the tendency of the act is bad; the general happiness requires that acts of the class shall be forborne.

But, concluding that acts of the class are useful or per-

icious, we are forced upon a further inference. Adverting to the known wisdom and the known benevolence of the Deity, we infer that he enjoins or forbids them by a general and inflexible rule.

Such is the inference at which we inevitably arrive, supposing that the acts be such as to call for the intervention of a lawgiver.

To rules thus inferred and lodged in the memory, our conduct would conform immediately if it were truly adjusted to utility.

We should not therefore, as the objection supposes, be under the necessity of pausing and calculating upon each act or forbearance. To do so would be superfluous, inasmuch as the result of that process would be embodied in a known rule; and mischievous, inasmuch as the true result would be expressed by that rule, whilst the process would probably be faulty if it were done on the spur of the occasion. On the contrary, the inferences suggested to our minds by repeated experience and observation are drawn into principles, or compressed into maxims; and these we carry about us ready for use, and apply to individual cases promptly or without hesitation.

This is the main, though not the only use of theory; which ignorant and weak people are in a habit of opposing to practice.

"'Tis true in theory; but, then, 'tis false in practice," says Noodle, with a look of the most ludicrous profundity.

But, with deference to this worshipful and weighty personage, that which is true in theory is also true in practice.

Seeing that a true theory is a compendium of particular truths, it is necessarily true as applied to particular cases. Unless the theory be true of particulars, and therefore true in practice, it has no truth at all. Truth is always particular, though language is commonly gen-

eral. Unless the terms of a theory can be resolved into particular truths, the theory is mere jargon; a coil of those senseless abstractions which often ensnare the instructed, and betray the ignorant.

They who talk of a thing being true in theory but not true in practice, mean (if they have a meaning) that the theory in question is false; that the particular truths which it concerns are treated imperfectly or incorrectly; and that, if applied in practice, it might mislead.

Speaking then generally, human conduct is inevitably guided by rules, in the form for the most part of general principles or maxims.

61. The human conduct which is subject to the Divine commands, is not only guided by rules, but also by moral sentiments associated with those rules.

If I believe (no matter why) that acts of a class or description are enjoined or forbidden by the Deity, a sentiment of approbation or disapprobation is inseparably connected in my mind with the thought or conception of such acts. And by this I am urged to do, or restrained from doing such acts, although I advert not to the reason in which my belief originated, nor recall the Divine rule which I have inferred from that reason.

Now, if the reason in which my belief originated be the useful or pernicious tendency of acts of the class, my conduct is truly adjusted to the principle of general utility, but not determined by a direct resort to it. It is indeed guided remotely by calculation; but, immediately, or at the moment of action is determined by sentiment; a sentiment associated with acts of the class, and with the rule which I have inferred from their tendency.

For example, Reasons which are quite satisfactory, but somewhat numerous and intricate convince me that the institution of property is necessary to the general good. Consequently I am convinced that thefts are pernicious;

and therefore I infer that the Deity forbids them by a general and inflexible rule. But I am not compelled to repeat the train of induction and reasoning by which I arrive at this rule, before I can know with certainty that I should forbear from taking your purse. Through my previous habits of thought and by my education, a sentiment of aversion has become associated in my mind with the thought or conception of a theft: And I am determined by that ready emotion to keep my fingers from your purse.

To think that the theory of utility would substitute calculation for sentiment, is a gross and flagrant error; the error of a shallow, precipitate understanding. He who opposes calculation and sentiment, opposes the rudder to the breeze which swells the sail. Sentiment without calculation were blind and capricious; but calculation without sentiment were inert.

To crush the moral sentiments is not the scope or purpose of the true theory of utility. It seeks to impress those sentiments with a just or beneficent direction: to free us of groundless likings, and from the tyranny of senseless antipathies; to fix our love upon the useful, our hate upon the pernicious.

If, then, the principle of utility were the presiding principle of our conduct, our conduct would be determined immediately by Divine rules and sentiments associated with those rules. And the application of the principle of utility to particular cases, would neither be attended by the errors, nor followed by the mischiefs, which the current objection in question supposes.

62. But these conclusions (like most conclusions) must be taken with limitations.

There certainly are cases (of comparatively rare occurrence) wherein the specific considerations balance or outweigh the general: cases which (in the language of Bacon)



are "immersed in matter:" cases perplexed with peculiarities which can not be safely neglected, in short anomalous cases. Even in these to depart from the rule is mischievous; but the specific consequences of the resolve are so important that the mischief of following the rule may outweigh the mischief of breaking it.

For instance, it is a general inference from the principle of utility, that God commands obedience to established Government. Without obedience to "the powers that be" security is weakened, and happiness, as a general rule, diminished. Disobedience even to a bad government is an evil. But the change from a bad government to a good one is an end so important, that if resistance will probably attain that end the subjects are justified in entertaining the question of resistance. The members of a political society who revolve this momentous question must dismiss the rule and calculate specific consequences. They must measure the extent of the mischief wrought by the actual government; the chance of getting a better by resistance; the inevitable evil of resistance whether it prosper or fail; and the possible good which may follow successful resistance. And upon a calculation of these elements they must solve the question to the best of their knowledge and ability.

In the anomalous case the application of the principle of utility would be beset with the difficulties which the objection in question imputes to it generally. The calculation and resolve would be a difficult and uncertain process, and one upon which the wise and the good and the brave might differ. A Milton or a Hampden might animate their countrymen to resistance; a Hobbes or a Falkland would counsel obedience and peace.

But although the principle of utility would afford no certain solution, the community would be fortunate if their opinions and sentiments were formed upon it. The

pretensions of each party being referred to an intelligible standard, would be capable of abatement by mutual concessions, so that compromise would at least be possible. The adherents of the established Government might prefer innovations which they disapproved to the mischiefs of a violent contest. The party affecting reform would probably accept concessions short of their notions and wishes, rather than insist in the pursuit of a greater possible good through the evils and hazards of a war.

But if instead of measuring the object by the standard of utility, each party were led by the ears and appealed to unmeaning phrases such as the "rights of man," "the sacred rights of sovereigns," "unalienable liberties," "eternal and immutable justice," "an original contract or covenant," or "the principles of an inviolable constitution," neither could compare its object with the cost of a violent pursuit, nor would there be room for compromise. The phrases having no meaning, the objects represented by them are of course invaluable, and must be fought for "to the bitter end" regardless of cost.

It really is important that men should think distinctly and speak with a meaning.

In most of the domestic broils which have agitated civilized communities, the result has been determined or seriously affected by the nature of the prevalent talk; by the nature of the topics or phrases which have figured in the war of words.

Take for example the needless and disastrous war waged by England with her American colonies. The stupid and infuriate majority who rushed into that odious war, could perceive and discourse of nothing but the sovereignty of the mother country, and her so-called right to tax her colonial subjects.

Had the dominant opinions and sentiments of the people of England been fashioned on the principles of utility

the public would have asked,—Is it the interest of England to insist upon her sovereignty? Is it her interest to exercise her right without the approbation of the colonists? For the chance of a slight revenue to be wrung from her American subjects, and of a trifling relief from the taxation which now oppresses herself, shall she drive those reluctant subjects to assert their alleged independence, visit her own children with the evil of war, squander her treasures and soldiers in trying to keep them down, and desolate the very region from which the revenue must be drawn?

If these and the like considerations had determined the public mind, the public would have damned the project of taxing and coercing the colonies, and the Government would have abandoned the project. Thus would the expenses and miseries of the war have been avoided; the connection of England with America not have been torn asunder; and if their common interests had led them to dissolve it quietly, the relation of sovereign and subject, of parent and child, would have been followed by an equal, but intimate and lasting alliance. For the interests of the two peoples coincide, and the hostilities, open and covert, which still smoulder between them, are the offspring of an antipathy begotten of their original quarrel.

Such considerations would have swayed the mind of the English Parliament and public had they listened to Mr. Burke. He asked them what they would get if the project of coercion should succeed; and implored them to compare the advantage with the hazard and the cost. But the sound practical men still insisted on the right; and sagaciously shook their heads at him, as a refiner and a theorist.

If a serious difference shall arise between ourselves and Canada, or if a serious difference shall arise between our-

selves and Ireland, an attempt will probably be made to cram us with the same stuff. But, such are the mighty strides which reason has taken in the interval, that I hope we shall not swallow it with the relish of our good ancestors. It will probably occur to us to ask whether she be worth keeping, and whether she be worth keeping at the cost of a war? I think there is nothing romantic in the hope which I now express; since an admirable speech of Mr. Baring, advising the relinquishment of Canada, was seemingly received, a few years ago, with general assent and approbation.\*

63. There are, then, anomalous cases; and to these the man whose conduct was fashioned on utility, would apply that ultimate principle immediately or directly. And the application of the principle would probably be beset with the difficulties which the current objection in question imputes to it generally.

But even in these cases, the principle would afford an intelligible test, and a likelihood of a just solution; a probability of discovering the conduct required by the general good, and therefore required by the commands of a wise and benevolent Deity.

And the anomalies, after all, are comparatively few.

\* This was published in 1832. Since then further advances have been made towards the rational discussion of such questions. Indeed, most people would now be ashamed to discuss them without at least professing to argue on grounds of utility. The particular topics immediately above referred to are at this time (1874) hardly agitated, the one because Canada is self-reliant and content, the other because leading statesmen of both parties are agreed, on the argument of expediency alone, that Ireland is worth keeping at the cost of a war. By way of contrast to the principal topic discussed in the text may be suggested the question which arose at the commencement of the great war of Secession in America. There were not wanting cries or false issues—The right of Secession—The Union, one and indivisible: But there were issues more real and important. To confine within the states who owned it their abominable domestic institution—(emancipation was an afterthought): to protect the threatened channels of commerce and national wealth: these were the large objects which tardily determined the inflexible purpose of the President who interpreted the mind of a great nation.—R. C.

In the great majority of cases, the general happiness requires that rules shall be observed, and that sentiments associated with rules shall be promptly obeyed. If our conduct were truly adjusted to the principle of general utility, our conduct would seldom be determined by an immediate or direct resort to it.

### LECTURE III.

64. But here arises a difficulty which is really perplexing, and which hardly admits of a complete solution.

If the Divine laws must be gathered from the tendencies of action, how can they who are bound to keep them, know them fully and correctly?

So numerous are the classes of actions to which those laws relate, that no single mind can mark the whole of those classes, and examine completely their respective tendencies.

Besides, ethical, like other wisdom, "cometh by opportunity of leisure;" and the many, busied with earning the means of living, are unable to explore the field of ethics, and to learn their numerous duties by learning the tendencies of actions.

If the Divine laws must be gathered from the tendencies of actions, the inevitable conclusion is absurd and monstrous—God has given us laws which no man can know completely, and to which the great bulk of mankind has scarcely the slightest access.

The considerations suggested by this and the next discourse, may solve or extenuate this perplexing difficulty.

65. In so far as law and morality are what they ought to be, legal and moral rules have been fashioned on the principle of utility, or obtained by observation and induction from the tendencies of human actions. But it

is not necessary that all whom they bind should know or advert to the process through which they have been gotten. If all whom they bind keep or observe them, the ends to which they exist are sufficiently accomplished ; although many of the persons who observe them are unable to perceive their ends, and ignorant of the method by which they have been constructed, or of the proofs by which they are established.

According to the theory of utility, the science of Ethics or Deontology (or the science of Law and Morality, as they should be, or ought to be), rests upon observation and induction. The science has been formed, through a long succession of ages, by many and separate contributions from many and separate discoverers. No single mind could explore the whole of the field, though each of its numerous departments has been explored by numerous inquirers.

If positive law and morality were exactly fashioned to utility, all its constituent rules might be known by all or most. But all the numerous reasons upon which the system would rest could scarcely be compassed by any ; while most must limit their inquiries to a few of those numerous reasons. Many of the rules of conduct actually observed or admitted would be taken even by the most instructed on authority, testimony, or trust, and a large number of the less instructed, without an attempt to examine the reasons, must receive the whole of the rules from the teaching and example of others.

But this inconvenience is not peculiar to law and morality. It extends to all the sciences, and to all the arts.

Many conclusions of mathematics applied to natural phenomena are doubtless believed on authority or testimony by deep and searching mathematicians ; and of the thousands who apply arithmetic to daily and hourly use,

not one in a hundred knows or surmises the reasons upon which its rules are founded. Of the millions who till the earth and ply the various handicrafts, few are acquainted with the grounds of their homely but important arts, though these arts are generally practiced with passable expertness and success. The greatest part of any man's knowledge consists of results gotten by the researches of others, and taken by himself upon testimony.

And in many departments of science we may safely rely upon testimony; though the knowledge which we thus obtain is less satisfactory than that which we win for ourselves by direct examination of the proofs.

In the mathematical and physical sciences, and in the arts which are founded upon them, we may commonly trust the conclusions which we take upon authority. For the adepts in these sciences and arts agree in many of their most important results, and are at least free from any temptation to deceive the ignorant.

66. But the case is unhappily different with the important science of ethics, and with the various sciences—legislation, politics, and political economy—nearly related to ethics. Those who have inquired, or affected to inquire into ethics, have rarely been impartial, and therefore have differed in their results. Sinister interests, and prejudices thence arising, have made them advocates rather than inquirers. Instead of examining the evidence and honestly pursuing its consequences, most of them have hunted for arguments in favor of given conclusions, and have neglected or purposely suppressed the unbending and incommensurable considerations which pointed at opposite inferences.

Now, how can the bulk of mankind, who have little opportunity for research, compare the respective merits of these varying and hostile opinions? Here, testimony is not to be trusted. There is not that concurrence or

agreement of numerous and impartial inquirers, to which the most cautious and erect understanding readily and wisely defers. The multitude, anxiously busied with the means of earning a precarious livelihood, are debarred from every opportunity of carefully surveying the evidence; whilst every authority, whereon they may hang their faith, wants that mark of trustworthiness which justifies reliance on authority.

Accordingly, the science of ethics and the nearly related sciences lag behind the others. The sincere inquirers are few, and the multitude indiscriminating. Consequently the advancement of the sciences themselves is comparatively slow; whilst the most perspicuous of the truths, with which they are occasionally enriched, are either summarily rejected by the many, or win their way to general assent through a long and dubious struggle with established and obstinate errors.

Many of the legal and moral rules which obtain in the most civilized communities, rest upon brute custom and not upon manly reason. They have been taken from preceding generations without examination, and are deeply tinged with the childish caprices and narrow views of barbarity. And yet they have been cherished and perpetuated, through ages of advancing knowledge, to the comparatively enlightened period in which it is our happiness to live.

67. It were idle to deny the difficulty. The diffusion and the advancement of ethical truth are hindered by great and peculiar obstacles.

But these obstacles, I am firmly convinced, will gradually disappear. In two causes of slow but sure operation, we may clearly perceive a cure, or at least a palliative of the evil.—In every civilized community of the Old and New World, the leading principles of the science of ethics, and of the nearly related sciences, are gradually



finding their way, in company with other knowledge, amongst the mass of the people ; whilst the persons who accurately study and labor to advance these sciences, are proportionately increasing in number, and waxing in zeal and activity. From the combination of these two causes we may hope for a more rapid progress both in the discovery and in the diffusion of moral truth.

68. Profound knowledge of these, as of the other sciences, will always be confined to the comparatively few who study them long and assiduously. But the multitude are fully competent to conceive the leading principles, and to apply them to particular cases. And, if they were imbibed with those principles, and practiced in the art of applying them, they would be docile to the voice of reason, and armed against sophistry and error. The man who is both ignorant of principles and unpracticed in right reasoning differs vastly from the man who is simply ignorant of particulars or details. The latter can reason correctly from premises supplied to him, and can justly estimate the conclusions drawn from those premises by others. If the minds of the many were informed and invigorated, so far as their position will permit, they could distinguish the statements and reasonings of their instructed and judicious friends, from the lies and fallacies of those who would use them to sinister purposes, and from the equally pernicious nonsense of their weak and ignorant well-wishers. They would thus be competent to examine and fathom the questions which it most behoves them to understand : Though the leisure which they can snatch from their callings is necessarily so limited, that their opinions upon numerous questions of subordinate importance would continue to be taken from the mere authority of others.

69. The shortest and clearest illustrations of this most

cheering truth are furnished by the inestimable science of political economy. The broad or leading principles of this science may be mastered with moderate attention in a short period. With these simple, but commanding principles, a number of important questions are easily resolved. And, if the multitude (as they can and will) shall ever understand these principles, many pernicious prejudices will be extirpated from the popular mind, and truths of ineffable moment planted in their stead.

For example, the inequality which in all civilized countries follows the beneficent institution of property, is necessarily invidious. To the jaundiced eyes of the ignorant poor it seems monstrous that they who toil and produce should fare scantily, while others who "delve not nor spin," should fatten on the fruits of labor. Of the numerous evils which flow from this single prejudice I shall touch on a few.

70. In the first place, this prejudice blinds the people to the cause of their sufferings, and to the only remedy or palliative which the case will admit.

Want and labor spring from the niggardliness of nature, and not from the inequality which is consequent on the institution of property. These evils are inseparable from the condition of man upon earth; and are lightened, not aggravated, by this useful, though invidious institution. Capital and the arts which depend on it are creatures of the institution of property; and from capital and by means of the arts depending on it the reward of the laborers is obtained. Without the institution of property and the capital accumulated by it their reward would be far scantier and infinitely more precarious than it is. They are in fact, though not in name, co-sharers in the accumulated wealth.

It is to be wished that their reward were greater, and that their toil consisted of less incessant drudgery. But

any change in these respects depends on themselves and not on the will of the rich. In the true principle of population, detected by the sagacity of Mr. Malthus, they must look for the cause and the remedy of their penury and excessive toil. There they may find the means of comparative affluence, of reasonable leisure, and of personal dignity and political influence.

71. And these momentous truths are deducible from plain principles by short and obvious inferences. Here is no need of large and careful research, or of subtle and sustained thinking. If the people understood distinctly a few indisputable propositions, and were capable of an easy process of reasoning, their minds would be purged of the prejudice which blinds them to the cause of their sufferings, and they would see and apply the remedy suggested by the principle of population. Their repinings at the affluence of the rich would be appeased. Their murmurs at the injustice of the rich would be silenced. They would see that violations of property are mischievous to themselves:—by weakening the motives to accumulation, and so diminishing the fund which yields the laborer his subsistence. They would see that they are deeply interested in the security of property; that, if they adjusted their numbers to the demand for their labor, they would share abundantly with their employers in the blessings of that useful institution.

72. Another of the numerous evils which flow from the prejudice in question, is the frequency of crimes. Nineteen offenses out of twenty are offenses against property. To offenses of this class, poverty, for the most part, is the incentive.

And while this prejudice perpetuates poverty by blinding people to the cause and the remedy, it weakens the restraints which arise from public disapproba-

tion. Compared with the fear of legal punishment, that of public disapprobation is scarcely less effectual as a deterring motive, and infinitely more effectual as a means of rooting in the soul a prompt aversion from crime. The activity aroused in the case of crimes which excite public disapprobation strengthens the legal sanction by making detection and punishment more certain.

73. If the people saw distinctly the tendencies of offenses against property and the grounds of the punishments; if they were therefore bent upon pursuing the criminals to justice; the laws which prohibit these offenses would seldom be broken with impunity, and by consequence would seldom be broken. An enlightened people were a better auxiliary to the judge than an army of policemen.

74. But, in consequence of the prejudice in question, the fear of public disapprobation scarcely operates upon the poor to the end of restraining them from offenses against the property of the wealthier classes. For every man's public is formed of his own class. The poor man's public is formed of the poor. And the crimes which affect merely the property of the wealthier classes are regarded with little disfavor, and with no abhorrence, by the indigent and ignorant portion of the working people. Not perceiving that such crimes are pernicious to all classes, but considering property to be a benefit in which they have no share and which is enjoyed by others at their expense, they are prone to consider such crimes as reprisals made upon usurpers and enemies. They regard the criminal with sympathy rather than with indignation. They incline to favor, or, at least, wink at his escape, rather than to lend their hearty aid towards bringing him to justice.

75. Those who have inquired into the causes of crimes, and into the means of lessening their number, have com-

monly expected magnificent results from an improved system of punishments. Doubtless something might be and has been done by a judicious mitigation of punishments, and by removing that frequent inclination to abet the escape of a criminal which springs from their repulsive severity. Something also by improvements in prison-discipline, and by providing a refuge for criminals who have suffered their punishments. For the stigma of legal punishment is commonly indelible; and, by debarring the unhappy criminal from the means of living honestly, forces him on further crimes.

76. But nothing but the diffusion of knowledge through the great mass of the people will go to the root of the evil. Nothing but this will extirpate their prejudices, and correct their moral sentiments; or lay them under the beneficial restraints which operate so potently on the more cultivated classes.

The evils which I have now mentioned, with many which I pass in silence, flow from a single prejudice,—a single error. And this, with other prejudices, might be expelled from the understandings and sentiments of the multitude, if they had mastered the broad principles of the science of political economy, and could make the easiest applications of those simple, though commanding truths.

77. The nicer points of political economy, *e. g.*, the functions of paper money, the incidents of taxes, &c., will probably never be understood by the multitude, and their opinions (if they have any) on those points will always be taken from authority. But the infinitely more important principles,—the reasons which call for the institution of property, and the effect of the principle of population on the price of labor,—are not difficult to master. If these were clearly apprehended by the many, they would be raised from penury to comfort; from the

necessity of toiling like cattle, to the enjoyment of sufficient leisure ; from ignorance and brutishness, to knowledge and refinement ; from abject subjection, to the independence which commands respect.

78. I could show, by many additional and pregnant examples, that the multitude might clearly apprehend the leading principles of ethics, and also of the nearly related sciences ; and that, if they had seized these principles, and could reason distinctly and justly, all the more momentous of the derivative practical truths would find access to their understandings and expel the antagonist errors.

And the multitude (in civilized communities) would soon apprehend these principles, and would soon acquire the talent of reasoning distinctly and justly, if one of the weightiest of the duties, which God has laid upon governments, were performed with fidelity and zeal. For, if we must construe those duties by the principles of general utility, it is not less incumbent on governments to forward the diffusion of knowledge, than to protect their subjects from one another by a due administration of justice, or to defend them by a military force from the attacks of external enemies. A small fraction of the sums which are squandered in needless war, would provide complete instruction for the working people ; would give this important class that portion in the knowledge of the age, which consists with the nature of their callings, and with the necessity of toiling for a livelihood.

If ethical science rests upon observation and induction applied to the tendencies of actions, much of it (I admit) will ever be hidden from the multitude, or be taken by them on authority, testimony, or trust.

But the multitude might clearly understand the elements or ground-work of the science, together with the more momentous of the derivative practical truths. To

that extent they might be freed from the dominion of authority; from the necessity of blindly persisting in hereditary opinions and practices; or of turning and veering, for want of directing principles, with every wind of doctrine.

79. Nor is this the only advantage which would follow the wide diffusion of those elements of ethical science. Another advantage would be the rapid advancement of the science itself.

If the minds of the many were informed and invigorated, their coarse and sordid pleasures, and their stupid indifference about knowledge, would be supplanted by refined amusements, and by liberal curiosity. A numerous body of recruits from the lower middle class, and the higher class of the working people, would thicken the slender ranks of the reading and reflecting public: the public whose opinion determines the success or failure of books; and whose notice and favor are naturally courted by the writers.

And until that public shall be much extended, the science of ethics, with all the nearly related sciences, will advance slowly.

80. It was the opinion of Locke, in which I fully concur, that there is no peculiar uncertainty in the subject or matter of these sciences: that the great difficulties by which their advancement is impeded, are extrinsic, and arise from prejudices, the offspring of sinister interests; and that if those who seek, or affect to seek, the truth would pursue it with steadiness and "indifferency," they might frequently hit upon the object.

81. But this "indifferency" or impartiality, will be a rare quality among professors of truth, so long as their audience shall continue to be formed only from the classes elevated by wealth and social rank, and from the so-called "liberal" callings, The only sure guide in these

sciences is general utility: and the true conclusions of general utility will always run counter to the special interests of particular and narrow classes. It is hardly to be expected of writers whose reputation depends upon such classes, that they should fearlessly tread the path indicated by the general well-being. "Indifferency" is hardly to be expected of writers in so base a position. Knowing that a fraction of the community can make or mar their reputation, they (perhaps unconsciously) accommodate their conclusions to the prejudice of that narrower public. Or again, to borrow the apt expressions of Locke, "they begin by espousing the well-endowed opinions in fashion; and then seek arguments to show their beauty, or to varnish and disguise their deformity."

82. This sinister influence is exemplified in the celebrated and much esteemed treatise of Paley on Moral and Political Philosophy. Dr. Paley was, as men go, a wise and virtuous man. By the qualities of his head and heart, by the cast of his talents and affections, he was fitted, in a high degree, to seek for ethical truth, and to expound it successfully to others. He had a clear and a just understanding; a hearty contempt of paradox, and of ingenious but useless refinements; no fastidious disdain of the working people, but a warm sympathy with their homely enjoyments and sufferings. He knew that they are more numerous than all the rest of the community, and he felt that they are more important than all the rest of the community to the eye of unclouded reason and impartial benevolence.

If the bulk of the community had been instructed, so far as their position will permit, he might have looked for a host of readers from the middle classes; and from the better paid and more intelligent of the working people. To such readers, a well-made and honest treatise on Moral and Political Philosophy, in his clear,



vivid, downright, English style, would have been the most easy and attractive, as well as instructive and useful, of abstract or scientific books.

But those numerous classes of the community were commonly too coarse and ignorant to care for books of the sort. The great majority of the readers who were likely to look into his book, belonged to the classes which are elevated by rank or opulence, and to the peculiar professions or callings which are distinguished by the name of "liberal." A steady pursuit of the conclusions of general utility was therefore not the way to professional advancement, nor even the short cut to extensive reputation. And the character of the book betrays the position of the writer. In almost every chapter, and in almost every page, his fear of offending the prejudices of his audience palpably suppresses the suggestions of his clear and vigorous reason, and masters the better affections which inclined him to the general good.

He was one of the greatest and best of the great and excellent writers, who, by the strength of their philosophical genius, or by their large and tolerant spirit, have given imperishable luster to the Church of England, and extinguished or softened the hostility of many who reject her creed. He may rank with the Berkeleys and Butlers, with the Burnets, Tillotsons, and Hoadlys.

But, in spite of the esteem with which I regard his memory, truth compels me to add that the book is unworthy of the man. For there is much ignoble truckling to the dominant and influential few. There is a deal of shabby sophistry in defense or extenuation of abuses which the few are interested in upholding.

If there were a reading public numerous, discerning, and impartial, the science of ethics, and all the various sciences which are nearly related to ethics, would advance with unexampled rapidity.

By the hope of obtaining the approbation which it would bestow upon genuine merit, writers on these subjects would be incited to the patient research and reflection appropriate to a scientific inquiry. They would cultivate accuracy and simplicity of method, and seek precision, clearness, and conciseness, as the first and only essential requisites of style. And, what is equally important, they would become imbued with the spirit of dispassionate inquiry: they would pursue truth with "indifferency," secure in the protection of a numerous and just public. They would scrutinize established institutions, and current or received opinions, fearlessly, but coolly, with the freedom which is imperiously demanded by general utility, but without the antipathy which is begotten by the dread of persecution.

83. This patience in investigation, this accuracy and distinctness of method and style, this freedom and "indifferency" in the pursuit of the useful and the true, would thoroughly dispel the obscurity by which the science is clouded, and would clear it from most of its uncertainties. The wish, the hope, the prediction of Locke would in time be accomplished: and "ethics would rank with the sciences which are capable of demonstration." The adepts in ethical, as well as in mathematical science, would commonly agree in their results: And, as the jar or their conclusions gradually subsided, a body of doctrine and authority to which the multitude might trust would emerge from the existing chaos. For while the multitude would confine their direct examination to the elements of the science, they would find in the unanimous or general consent of numerous and impartial inquirers that mark of trust-worthiness which justifies reliance on authority, wherever we are debarred from the opportunity of examining the evidence for ourselves.\*

\* The period which has elapsed since the foregoing lecture was written, if

## LECTURE IV.

84. IN ORDER to link this lecture with the preceding one, I will now restate, in an abridged shape, the objection and the answer with which that lecture was occupied.

The objection may be put briefly, in the following manner:

If utility be the proximate test of positive law and morality, it is impossible that the rules of conduct actually obtaining amongst mankind should accord completely and correctly with the laws established by the Deity. The index to his will is imperfect and uncertain. His laws are signified obscurely to those upon whom they are binding, and are subject to inevitable and involuntary misconstruction.

For, first, positive law and morality, fashioned on the principle of utility, are gotten by observation and induction from the tendencies of human actions. And, these actions being infinitely various, and their effects being infinitely diversified, the work of classing them and of collecting their effects completely, transcends the limited faculties of created and finite beings.

And, secondly, if utility be the proximate test of positive law and morality, the defects and errors of popular or vulgar ethics will scarcely admit of a remedy. For if ethical truth be matter of science, and not of

not fully answering to the author's sanguine hopes, yet seems to have reached the beginning of a tardy fulfillment of some of them. And if sound conceptions of ethics and political economy have in our own country penetrated more widely and deeply than a few years ago was apparent, I believe it possible to discern, in the writings of those who have been most successful in diffusing this knowledge among the populace, a trace at least of Mr. Austin's influence; an influence far more powerful, as I have been assured, by those conversant with his living discourse, than can be estimated by those acquainted only with the remains of his writings.—R. C.

immediate consciousness, most of the ethical maxims which govern the sentiments of the multitude must be taken, without examination, from human authority. And human authority upon such subjects seems to consist of conflicting maxims, taught under the influence of prejudice—the offspring of sinister interests:

Such is the objection.—The only answer of which the objection will admit, is suggested by the remarks which I offered in my last lecture, and which I here repeat in an inverted and compendious form.

In the first place, the diffusion of ethical science amongst the great bulk of mankind will gradually remove the obstacles which prevent or retard its advancement.

Secondly: Though the many must trust to authority for a number of subordinate truths, they are competent to examine the elements which are the ground-work of the science of ethics, and to infer the more momentous of the derivative practical consequences.

And, thirdly, as the science of ethics advances, and is cleared of obscurity and uncertainties, they who are debarred from opportunities of examining the science extensively will find an authority whereon they may rationally rely, in the unanimous or general agreement of searching and impartial inquirers.

85. But this answer, it must be admitted, merely extenuates the objection. It shows that law and morality fashioned on the principle of utility might approach continually and indefinitely to absolute perfection. But it grants that law and morality so fashioned is inevitably defective and erroneous; that if the laws established by the Deity must be construed by the principle of utility, the most perfect system of ethics which the wit of man could conceive, were a partial and inaccurate copy of the Divine original or pattern.

And this (it may be urged) disproves the theory which makes the principle of utility the index to the Divine pleasure. For it consists not with the known wisdom and the known benevolence of the Deity, that he should signify his commands defectively and obscurely to those upon whom they are binding.

86. But, admitting the imperfection of utility as the index to the Divine pleasure, there is no necessary inference "that utility is not the index."

The objection is founded on the alleged inconsistency of evil with the perfect wisdom and goodness of God. But the argument of the objector proves too much. If the argument is sound, it would prove not only that all God's works are in fact exempt from evil, but also that the notion conveyed by the terms law, duty, and sanction, as applied to the Law of God, is a meaningless abstraction. For these terms imply the presence of evil in the world, and the prevention or remedy of that evil by a restraint which is in itself a further evil.

In truth, owing to causes hidden from the human understanding, all the works of God which are open to human observation are alloyed with imperfection or evil. Laws or commands (like medicine) suppose the existence of evils which they are designed to remedy, and let them be signified as they may, they remedy those evils imperfectly. Analogy might lead us to suppose that the Deity should signify his commands defectively and obscurely. That he should do so is strictly in keeping with the rest of his inscrutable ways; and such imperfection in the mode of manifesting his commands would be strictly analogous to the imperfection or evil which those commands or laws are designed to remedy. "That his laws are signified obscurely, if utility be the index to his laws," is therefore rather a presumption in favor of the theory which makes utility our guide.

My answer to the objection is the very argument which the excellent Butler, in his admirable "Analogy," has wielded in defense of Christianity with the vigor and the skill of a master.

Considered as a system of rules for the guidance of human conduct, the Christian religion is defective. There are also circumstances, regarding the manner of its promulgation, which human reason vainly labors to reconcile with the wisdom and goodness of God. Still it were absurd to argue "that the religion is not of God, because the religion is defective, and is imperfectly revealed to mankind." For, since evil pervades the universe, in so far as it is open to our inspection, a similar objection will lie to every system of religion which ascribes the existence of the universe to a wise and benevolent Author. Whoever believes that the universe is the work of benevolence and wisdom, is concluded, or estopped, by his own religious creed, from taking an objection of the kind to the creed or system of another.

Analogy (as Butler has shown) would lead us to expect the imperfection upon which the objection is founded. Something of the imperfection which runs through the frame of the universe, would probably be found in a revelation emanating from the Author of the universe.

And here my solution of the difficulty necessarily stops. To reconcile the existence of evil with the wisdom and goodness of God is a task which surpasses the powers of our narrow and feeble understandings. From the decided predominance of good which is observable in the order of the world, and from the manifold marks of wisdom which the order of the world exhibits, we may draw the cheering inference "that its Author is good and wise." Why the world which he has made is not altogether perfect, is a question impossible to solve, and idle to agitate. It is

enough us for to know that the Deity is perfectly good ; and that, since he is perfectly good, he wills the happiness of his creatures. This is a truth of the greatest practical moment. For the cast of the affections, which we attribute to the Deity, determines, for the most part, the cast of our moral sentiments.

87. If we reject utility as the index to God's commands, we must assent to the theory or hypothesis which supposes a moral sense. One of the adverse theories which regard the nature of that index is certainly true. He has left us to presume his commands from the tendencies of human actions, or he has given us a peculiar sense of which his commands are the objects.

88. All the hypotheses regarding the nature of that index which discard the principle of utility, are built upon the supposition of a peculiar or appropriate sense. The language of each of these hypotheses differs from the language of the others, but the import of each resembles the import of the rest.

89. By "a moral sense," with which I am furnished, I discern the human actions which the Deity enjoins and forbids : And, since you and the rest of the species are provided with a like organ, it is clear that this sense of mine is "the common sense of mankind." By "a moral instinct," with which the Deity has endowed me, I am urged to some of these actions, and am warned to forbear from others. "A principle of reflection or conscience," which Butler assures me I possess, informs me of their rectitude or pravity. Or "the innate practical principles," which Locke has presumed to question, define the duties which God has imposed upon me, with infallible clearness and certainty.

90. The hypothesis of a moral sense, variously signified by these various but equivalent expressions, involves two assumptions : Ist, That we are gifted with moral senti-

ments which are ultimate or inscrutable facts; 2ndly That these inscrutable sentiments are signs of the Divine will, or the proofs that the actions which excite them are enjoined or forbidden by God.

91. The first assumption involves certain positive and negative propositions; it implies positively that the conceptions entertained by human beings of certain human actions are generally accompanied by certain sentiments of approbation or disapprobation, and negatively that these sentiments are not the consequences of reflection upon the tendencies of human actions, not the consequences of education, nor the consequences or effects of any antecedents within the reach of our inspection. To express these negative propositions briefly, the sentiments in question are said to be "instinctive," or are termed "moral instincts." This word "instinct," it must be remembered, is essentially negative. When we say a bird builds her nest by instinct, we merely mean that she has not been taught how to do it by example or through education imparted by others. This it is necessary to remark, because (simple as the meaning is) the advocates of the theory now in question are apt to invest the word with the false and cheating appearance of a mysterious and magnificent meaning.

92. In order that we may clearly apprehend the nature of these "moral instincts," I will descend from general expressions to an imaginary case.

I will take the liberty of borrowing Paley's solitary savage: a child abandoned in the wilderness immediately after its birth, and growing to the age of manhood in estrangement from human society. In dealing with his subsequent history I shall not follow Paley, but proceed after my own fashion.

I imagine that the savage, as he wanders in search of prey, meets, for the first time in his life, with a man.



This man is a hunter, and is carrying a deer which he has killed. The savage pounces upon it. The hunter holds it fast. And, in order that he may remove this obstacle to the satisfaction of his hunger, the savage seizes a stone, and knocks the hunter on the head. Now, according to the hypothesis in question, the savage is affected with remorse—not merely compassion—but the more complex emotion of self-condemnation; with the feeling that haunts and tortures civilized or cultivated men, whenever they violate rules which accord with their notions of utility, or which they have learned from others to regard with habitual veneration.

Again: Shortly after the incident which I have now imagined, he meets with a second hunter, whom he also knocks on the head. But, in this instance, he is not the aggressor. He is attacked, and to prevent a deadly blow which is aimed at his own head, he kills the assailant. Now here, according to the hypothesis, he is not affected with remorse. The sufferings of the dying man move him, perhaps, to compassion; but his conscience (as the phrase goes) is tranquil. He feels as you would feel after a justifiable homicide; after you had shot a highwayman in defense of your goods and your life.

That you should feel remorse if you kill in an attempt to rob, and should not be affected with remorse if you kill a murderous robber, is a difference which I readily account for without the supposition of an instinct. The law of your country distinguishes the cases; and the current morality of your country accords with the law.

If you have never adverted to the reasons of that distinction, the difference between your feelings is easily explained by imputing it to education: the influence of authority and example on opinions, sentiments and habits.

If you have adverted to the reasons of that distinction,

you, of course, have been struck with its obvious utility. Generally speaking, the intentional killing of another is an act of pernicious tendency. If the act were frequent, it would annihilate that general security, and that general feeling of security, which are, or should be, the principal ends of political society and law. But the intentional killing of a robber who aims at your property and life, is an exception. Instead of being adverse to the principal ends of law, it rather promotes those ends. It tends, as punishment would, to deter others from the crime of murder; and in the particular instance, prevents the execution of the murderous design, an end which punishment would be too tardy to reach. The difference between the sentiments with which you regard the two acts is therefore easily explained by your imputing it to a perception of utility.

93. But the difference, supposed, between the feelings of the solitary savage, can not, on the hypothesis, be imputed to education.

Nor can the supposed difference be imputed to a perception of utility. He knocks a man on the head, that he may satisfy his hunger. He knocks another on the head, that he may escape from wounds and death. So far, then, as these different actions exclusively regard himself, they are equally good; and so far as these different actions regard the men whom he kills, they are equally bad. As tried by the test of utility, and with the lights which the savage possesses, the moral qualities of the two actions are precisely the same.

To the social man the difference between these actions, as tried by the test of utility, is immense.—The general happiness or good demands the institution of property; that the exclusive enjoyment conferred by the law upon the owner shall not be disturbed by private and unauthorized persons without the authority of the sovereign

acting for the common weal. Were want, however intense, an excuse for violations of property, that beneficent institution would become nugatory, and the ends of government and law would be defeated.—And, on the other hand, the very principle of utility which demands the institution of property requires that an attack upon the body shall be repelled at the instant; that, if the impending evil can not be averted otherwise, the aggressor shall be slain on the spot by the party whose life is in jeopardy.

But these are considerations which would not present themselves to the solitary savage. They involve a number of notions with which his mind would be unfurnished. They involve the notions of political society; of supreme government; of positive law; of legal right; of legal duty; of legal injury. The good and the evil of the two actions, in so far as the two actions would affect the immediate parties, is all that the savage could perceive.

The difference, supposed by the hypothesis, between the feelings of the savage, must, therefore, be ascribed to a moral sense, or to innate practical principles. Or (speaking in homlier but plainer language) he would regard the two actions with different sentiments, we know not why.

94. The first assumption then involved by the hypothesis in question, is that certain inscrutable sentiments or feelings accompany our conceptions of certain human actions, and that these sentiments or feelings are ultimate facts—simple elements of our nature. And thus far the hypothesis has been embraced by sceptics as well as by religionists. For example, it is supposed by David Hume, in his essay on the “Principles of Morals,” that some of our moral sentiments spring from a conception of utility; but he also appears to imagine that others are not to be analyzed, or belong exclusively to the province of taste. His intention, however, is not clear. When

he speaks of moral sentiments belonging to the province of taste, he may be adverting only to the origin of benevolence or sympathy, a very different thing from the sentiments of approbation or disapprobation which accompany our judgments upon actions.

95. The second assumption is this :—That the inscrutable sentiments, the existence of which is assumed by the first assumption, are signs of the Divine will, or proofs that the actions which excite them are enjoined or forbidden by God.

96. In the language of the admirable Butler (who is the ablest advocate of the hypothesis), the human actions by which these feelings are excited are their direct and appropriate objects : just as things visible are the direct and appropriate objects of the sense of seeing.

In homelier but plainer language, I may put his meaning thus,—As God has given us eyes, in order that we may see therewith, so has he gifted or endowed us with the feelings or sentiments in question, in order that we may distinguish directly, by means of these feelings or sentiments, the actions which he enjoins or permits, from the actions which he prohibits.

97. Now, if the Deity has endowed us with a moral sense or instinct, we are free of the difficulty to which we are subject if we must construe his laws by the principle of general utility. According to the hypothesis in question, the inscrutable feelings which are styled the moral sense, arise directly and inevitably with the thoughts of their appropriate objects. We can not mistake the laws which God has prescribed to mankind, although we may often be seduced by the blandishments of present advantage from the plain path of our duties. The understanding is never at a fault, although the will may be frail.

98. But here arises a small question.—Is there any evidence that we are gifted with feelings of the sort ?

99. That this question is possible, or is seriously asked and agitated, would seem of itself a sufficient proof that we are not endowed with such feelings.--According to the hypothesis of a moral sense, we are conscious of the feelings which indicate God's commands, as we are conscious of hunger or thirst. If I were really gifted with feelings or sentiments of the sort, I could no more seriously question whether I had them or not, and could no more blend and confound them with my other feelings or sentiments, than I can seriously question the existence of hunger or thirst, or can mistake the feeling which affects me when I am hungry for that which affects me when I am thirsty.

100. The two current arguments in favor of the hypothesis in question are raised on the following assertions: 1. The judgments which we pass internally upon the rectitude or pravity of actions are immediate and involuntary. 2. The moral sentiments of all men are precisely alike.

101. Now the first of these venturous assertions is not universally true. In numberless cases, the judgments which we pass internally upon the rectitude or pravity of actions are hesitating and slow. And it not unfrequently happens that we can not arrive at a conclusion, or are utterly at a loss to determine whether we shall praise or blame.

102. And, granting that our moral sentiments are always instantaneous and inevitable, this will not demonstrate that our moral sentiments are instinctive. Sentiments which are factitious, or begotten in the way of association, are not less prompt and involuntary than feelings which are instinctive or inscrutable. For example, we begin by loving money for the sake of the enjoyment which it purchases. In time, our love of enjoyment becomes inseparably associated with the thought of the

money which procures it. Again : we begin by loving knowledge as a means to ends. But, in time, the love of the ends becomes inseparably associated with the thought or conception of the instrument. Curiosity is instantly roused by every unusual appearance, although there is no purpose which the solution of the appearance would answer, or although we advert not to the purpose which the solution of the appearance might subserve.

103. The promptitude and decision with which we judge of actions are impertinent to the matter in question : for our moral sentiments would be prompt and inevitable, although they arose from a perception of utility, or were impressed upon our minds by the authority of our fellow-men. At the outset indeed, the sentiment derived from either of these sources would hardly be excited by the thought of the corresponding action. But, in time, the sentiment would adhere inseparably to the thought of the corresponding action ; and without recalling the ground of our moral approbation or aversion, would recur directly and inevitably with the conception of its appropriate object.

104. But to prove that moral sentiments are instinctive or inscrutable, it is boldly asserted, by the advocates of the hypothesis in question, that the moral sentiments of all men are precisely alike.

The argument raised on this hardy assertion may be stated briefly as follows :—No opinion or sentiment which is a result of observation and induction is held or felt by all mankind. Observation and induction, as applied to the same subject, lead different men to different conclusions. But the judgments which are passed internally upon the rectitude or pravity of actions, or the moral sentiments or feelings which actions excite, are precisely alike with all men. Consequently, our moral sentiments or feelings were neither acquired by our own inductions

from the tendencies of actions, nor obtained by the inductions of others and then impressed upon our minds by human authority and example. Therefore our moral sentiments or are instinctive, or are ultimate or inscrutable facts.

Now, although the assertion were granted that the moral sentiments of all men were precisely alike, it would hardly follow that moral sentiments are instinctive.

But the assertion is groundless, and contradicted by notorious facts. That the respective moral sentiments of different ages and nations, and of different men in the same age and nation, have differed to infinity, is a proposition resting on facts so familiar to every instructed mind, that I should hardly treat my hearers with due respect if I attempted to establish it by proof. I therefore assume it without an attempt at proof; and I oppose it to the assertion which I am now considering, and to the argument which is raised on that assertion.

105. The plain and glaring fact is this,—With regard to actions of a few classes, the moral sentiments of most, though not of all men, have been alike. But, with regard to actions of other classes, their moral sentiments have differed, through every shade or degree, from slight diversity to direct opposition.

106. And this is what might be expected, supposing that the principle of general utility is our only guide or index to the tacit commands of the Deity. For, first, the positions wherein men are, in different ages and nations, are, in many respects, widely different: and secondly, since human tastes are various, and human reason fallible, men's moral sentiments must often widely differ even in respect of the circumstances wherein their positions are alike. But, with regard to actions of a few classes, the dictates of utility are the same at all times

and places, and are also so obvious that they hardly admit of mistake or doubt. And hence would naturally ensue what observation shows us is the fact: namely, a general resemblance, with infinite variety, in the systems of law and morality which have actually obtained in the world.

107. According to the hypothesis which I have now stated and examined, the moral sense is our only index to the tacit commands of the Deity. According to an intermediate hypothesis, compounded of the hypothesis of utility and the hypothesis of a moral sense, the moral sense is our index to some of his tacit commands, but the principle of general utility is our index to others.

In so far as I can gather his opinion from his admirable sermons, it would seem that the compound hypothesis was embraced by Bishop Butler. But of this I am not certain: for, from many passages in those sermons, we may perhaps infer that he thought the moral sense our only index or guide.

The compound hypothesis now in question naturally arose from the fact to which I have already adverted.—With regard to actions of a few classes, the moral sentiments of most, though not of all men, have been alike. With regard to actions of other classes, their moral sentiments have differed, through every shade or degree, from slight diversity to direct opposition.—In respect to the classes of actions, with regard to which their moral sentiments have agreed, there was some show of reason for the supposition of a moral sense.—In respect to the classes of actions, with regard to which their moral sentiments have differed, the supposition of a moral sense seemed to be excluded.

But the modified or mixed hypothesis now in question is not less halting than the pure hypothesis of a moral sense or instinct.—With regard to actions of a few classes,



the moral sentiments of most men have concurred or agreed. But it would be hardly possible to indicate a single class of actions, with regard to which all men have thought and felt alike. And it is clear that every objection to the simple or pure hypothesis may be urged, with slight adaptations, against the modified or mixed.

108. At this point I will briefly indicate the practical importance of the above disquisition to a treatise occupied with the *rationale* of jurisprudence.

109. By modern writers on jurisprudence, law (including in the term positive law and a portion of positive morality) is divided into law natural and law positive. By the classical Roman jurists, borrowing from the Greek philosophers, *jus civile* (or positive law together with a portion of positive morality) is divided into *jus gentium* and *jus civile*. These are exactly equivalent divisions.

110. By reason of these respective divisions of law, crimes are divided, by modern writers on jurisprudence, into *mala in se* and *mala quia prohibita*;—by the classical Roman jurists, into crimes *juris gentium* and crimes *jure civili*. And these divisions of crimes, like the divisions of law wherefrom they are respectively derived, are equivalent.

III. Now without a clear apprehension of the hypothesis of utility, of the pure hypothesis of a moral sense, and of the modified or mixed hypothesis which is compounded of the others, the distinction of law into natural and positive, with the various derivative distinctions which rest upon that main one, are utterly unintelligible. Assuming the hypothesis of utility, or assuming the pure hypothesis of a moral sense, these distinctions are senseless. But, assuming the intermediate hypothesis which is compounded of the others, positive law, and also positive morality, is inevitably distinguished into natural and positive. In other words, if the modified or

mixed hypothesis be founded in truth, positive human rules fall into two parcels:—1. Positive human rules which obtain with all mankind; and the conformity of which to Divine commands is, therefore, indicated by the moral sense: 2. Positive human rules which do not obtain universally; and the conformity of which to Divine commands is, therefore, not indicated by that infallible guide.

II2. Having the stated the hypothesis of utility, the hypothesis of a moral sense, and the modified or mixed hypothesis which is compounded of the others, I will close my disquisitions on the index to God's commands with an endeavor to clear the hypothesis of utility from two current though gross misconceptions.

II3. Of the writers who maintain as well as those who impugn the theory of utility, three out of four fall into one or the other of the following errors.—1. Some of them confound the motives which ought to determine our conduct with the proximate measure or test to which our conduct should conform, and by which our conduct should be tried.—2. Others confound the theory of general utility with that theory or hypothesis concerning the origin of benevolence which is branded by its ignorant or disingenuous adversaries with the misleading and invidious name of the selfish system.

I will examine these two errors in their order.

II4. According to the theory of utility, the measure or test of human conduct is the law set by God to his human creatures. Now some of his commands are revealed, whilst others are unrevealed. The commands which God has revealed, we must gather from the terms wherein they are promulgated. The commands which he has not revealed, we must construe by the principle of utility; by the probable effects of our conduct on that general happiness or good which is the final cause

or purpose of the good and wise lawgiver in all his laws and commandments.

**II5.** Strictly speaking, therefore, utility is not the measure to which our conduct should conform, nor the test by which our conduct should be tried. It is not in itself the source or spring of our highest or paramount obligations, but it guides us to the source whence these obligations flow. It is the index to the measure, the index to the test. But, since we conform to the measure by following the suggestions of the index, I may say with sufficient, though not with strict propriety, that utility is the measure or test proximately or immediately. Accordingly, I style the Divine commands the ultimate measure or test; but I style the principle of utility, or the general happiness or good, the proximate measure to which our conduct should conform, or the proximate test by which our conduct should be tried.

**II6.** Now, though the general good is that proximate measure, or test, it is not in all, or even in most cases the motive or inducement which ought to determine our conduct. If our conduct were always determined by it considered as a motive or inducement, our conduct would often disagree with it considered as the standard or measure.

Though these propositions may sound like paradoxes, they are perfectly just. I can not here go through the whole of the proofs by which they are capable of being established beyond contradiction. I shall content myself with throwing out some hints by way of illustration.

**II7.** By the general or public good or happiness I mean the aggregate enjoyments of the individuals to whom I refer collectively by the words "general" or "public." These words "general," "public," and others such as "family," "country," "mankind," are concise expressions for a number of individual persons con-

sidered collectively or as a whole. If the good of those persons considered singly were sacrificed to the supposed good of the whole, the general good would be destroyed by the sacrifice. The general good would be sacrificed to the name of the general good:—an absurdity when broadly stated, but nevertheless a consequence to which some current notions, for example the notion of the public good current in the ancient republics, have inevitably tended.

Now (speaking generally) every individual is the best possible judge of his own interests; of what will affect himself with the greatest pleasures and pains. Compared with this intimate knowledge, his knowledge of the interests of others is vague conjecture.

If every individual neglected his own for the sake of pursuing and promoting the interests of others, the interests of every individual would be managed unskillfully; and the general or public good would diminish with the good of the individuals of whom that general or public is constituted or composed.

**II8.** Consequently, the principle of general utility imperiously demands that each shall commonly attend to his own rather than to the interests of others; that he shall not habitually neglect that which he knows accurately in order that he may habitually pursue that which he knows imperfectly.

This is also the arrangement which the Author of man's nature manifestly intended. For our self-regarding affections are steadier and stronger than our social; the motives by which we are urged to pursue our peculiar good operate with more constancy, and commonly with more energy, than the motives by which we are solicited to pursue the good of our fellows.

The principle of general utility does not demand of us that we shall always or habitually intend the general

good; but only that we shall never pursue our own peculiar good by means inconsistent with that paramount object.

119. For example: A man delves or spins to put money in his purse, and not with the purpose or thought of promoting the general well-being. But by delving or spinning he adds to the sum of commodities; and promotes that general well-being, which is not, and ought not to be, his practical end. General utility is not his motive to action. But his action conforms to utility considered as the standard of conduct; and when tried by the test of utility, deserves approbation.

120. Again: Of all pleasures bodily or mental, the pleasures of mutual love, cemented by mutual esteem, are the most enduring and varied. They therefore contribute largely to swell the sum of human happiness. And for that reason, the well-wisher of the general good must consider them with much complacency. But he is far from maintaining that the general good ought to be the motive of the lover. It was never contended or conceived by a sound, orthodox utilitarian, that the lover should kiss his mistress with an eye to the common weal.

And by this last example I am naturally conducted to this further consideration.

Even where utility requires that benevolence shall be our motive, it commonly requires that we shall be determined by partial rather than by general benevolence; by the love of family, rather than by sympathy with the wider circle of friends or acquaintance; by sympathy with friends or acquaintance, rather than by patriotism; by patriotism or love of country, rather than by the larger humanity which embraces mankind.

121. In short, the principle of utility requires that we shall act with the utmost effect, to the end of producing

good. And (speaking generally) we act most effectively to that end when our motive or inducement to conduct is the most urgent and steady, when the sphere wherein we act is the most restricted and the most familiar to us, and when the purpose which we directly pursue is the most determinate or precise.

The foregoing general statement must, indeed, be received with numerous limitations. The principle of utility not unfrequently requires that the order at which I have pointed shall be inverted or reversed; that the self-regarding affections shall yield to the love of family, or to the sympathy with friends or acquaintance; these to the love of country; the love of country to the love of mankind; in short, that the general happiness or good which is always the test of our conduct, shall also be the practical end to which our conduct is directed.

**122.** In order further to dissipate the confusion of ideas giving rise to the misconception last examined, I shall here pause to analyze the expression "good and bad motives," and to show in what sense it represents a sound distinction.

Properly speaking, no motive is either good or bad; since there is no motive which may not by possibility, and which does not occasionally in fact, lead both to beneficial and to mischievous conduct.

**123.** Thus in the case which I have already used as an illustration, that of the man who digs or weaves for his own subsistence; the motive is self-regarding, but the action is beneficial. The same motive, the desire of subsistence, may lead to pernicious acts, such as stealing. Love of reputation is a motive generally productive of beneficial acts; and with some persons a most powerful incentive to acts for the public good. That form of love of reputation called vanity, on the other hand, implying, as it does, that the aim of its possessor is set upon worth-

less objects, commonly leads to a waste of energy, and is therefore of evil tendency. Yet if subordinated in the individual to other springs of action, and existing merely as a latent feeling of self-complacency arising out of considerations however foolish or unsubstantial, it may be harmless, or even useful as tending to conserve energy. Benevolence, on the other hand, and even religion, though certainly unselfish, and generally esteemed good motives, may when narrowed in their aims, or directed by a perverted understanding, lead to the most pernicious actions. For instance, the affection for children is with many persons more apt to lead to acts contrary to the public good than any purely selfish motive; and the palliation, which the supposed goodness of the motive constitutes in the eyes of the public for the pernicious act, encourages men to do for the sake of their children, actions which they would be ashamed to do for their own direct interest. Even that enlarged benevolence which embraces humanity, may lead to actions extremely mischievous, unless guided by a perfectly sound judgment; *e.g.* attempts at tyrannicide.

But, although every motive may lead to good or bad, some are pre-eminently likely to lead to good; *e.g.* benevolence, love of reputation, religion. Others pre-eminently likely to lead to bad, and little likely to lead to good; *e.g.* the anti-social;—antipathy—particular or general. Others, again, are as likely to lead to good as to bad; *e.g.* the self-regarding. They are the origin of most of the steady industry, but also of most of the offenses of men.

In this qualified sense we may correctly speak of good motives,—good dispositions; and these ought to be recognized and approved. For the quality of the act, though ultimately tested by its conformity to utility, does to some extent depend upon the motive or disposition. These are the springs of action. It is important that

they should be abundant and healthy ; but whether their effect shall be a bounteous harvest or a desolating torrent depends on how they are guided and directed.

To adjust the respective claims of the selfish and social motives, of partial sympathy and general benevolence, is a task which belongs to the detail, rather than to the principles of ethics ; and if pursued would lead me too far from the appropriate purpose of my Course. What I have suggested will suffice to conduct the reflecting to the following conclusions : 1. General utility considered as the measure or test, differs from general utility considered as a motive or inducement. 2. Our conduct, if truly adjusted to the principle of utility, would conform to rules fashioned on the principle of utility, or be guided by sentiments associated with such rules. But, this notwithstanding, general utility, or the general happiness or good, would not be in all, or even in most cases, our motive to action or forbearance.

124. Having touched on the first of the two misconceptions, I will now advert to the second.

They who fall into this misconception are guilty of two errors. 1. They mistake and distort the hypothesis concerning the origin of benevolence which is styled the selfish system. 2. They imagine that that hypothesis, as thus mistaken and distorted, is an essential or necessary ingredient in the theory of utility. The first of these mistakes is made amongst others by Godwin,\* the second by Paley.

I will examine the two errors into which the misconception may be resolved, in the order wherein I have stated them.

\* "Enquiry concerning Political Justice." By William Godwin. January, 1793, book iv. ch. viii. I presume the author classes Godwin amongst the adherents of the theory of utility. This writer certainly anticipates, under the name of the principle of justice, some of the arguments most effectively urged in favor of the theory of utility by its more modern adherents.—R. C



125. 1. According to an hypothesis of Hartley and of various others writers, benevolence of sympathy is not an ultimate fact,—it emanates from self-love, or from the self-regarding affections, through that familiar process styled “the association of ideas,” to which I have already adverted.

It follows that these writers dispute not the existence of disinterested benevolence or sympathy ; but, assuming the existence of the feeling, they endeavor to trace it to the simpler and ulterior feeling of which they believe it the offspring.

Yet, palpable as this consequence is, it is fancied by many opponents of the theory of utility, and even by some of its adherents, that these writers dispute the existence of disinterested benevolence or sympathy.

According to the hypothesis in question as thus mistaken and distorted, we have no sympathy properly so called with the pleasures and pains of others. That which is styled sympathy, or that which is styled benevolence, is provident regard to self. Every good office done by man to man springs from a calculation of which self is the object. We perceive that we depend on others for much of our own happiness ; and, perceiving this, we do good unto others that others may do it unto us.\*

\* The selfish system in this its literal import, is flatly inconsistent with obvious facts, and is hardly deserving of serious refutation. We are daily and hourly conscious of disinterested benevolence or sympathy in the sense of wishing the good of others without regard to our own. And here I must note an ambiguity of the word selfish. In the wider sense all motives are selfish. A motive is a wish, and therefore a pain affecting a man's self, which seeks relief. In the narrower sense selfish motives are opposed to benevolent ones. To obviate the ambiguity Bentham discards the word selfish. The motives which solicit us to pursue the good of others he styles social. Those which impel us to pursue our own advantage he styles self-regarding. Besides this, there are disinterested motives by which we are solicited to visit others with evil. These disinterested but malevolent motives Bentham styles anti-social. The existence of such motives has been questioned, but in imputing them to human nature, Bentham is not singular. Their existence is assumed by Aristotle and Butler, and by all who have examined the springs or motives of conduct. And the fact is easily explained by the all-pervading principle which is styled “the association of ideas.”

126. 2. Having thus mistaken and distorted the so-called selfish system, many opponents of the theory of utility, together with some adherents of the same theory, imagine that the former, as thus mistaken and distorted, is a necessary portion of the latter. And hence it naturally follows that the adherents of the theory of utility are styled by many of its opponents "selfish, sordid, and cold-blooded calculators."

According to the theory of utility, the principle of general utility is the index to God's commands. Though benevolence be nothing but a name for provident regard to self, we are moved by regard to self when we think of the awful sanctions of those commands to pursue the generally useful, and to forbear from the generally pernicious. This is the version of the theory of utility rendered by Paley. He lays down general utility as the proximate test of conduct; but he supposes that all the motives by which our conduct is determined are purely self-regarding.

127. Now the theory of ethics, which I style the theory of utility, has no necessary connection with any theory of motives; nor is it concerned with any hypothesis as to the nature or origin of benevolence or sympathy. I think Paley's version of the theory of utility is coherent; though I think his theory of motives miserably partial and shallow, and that mere regard to self, although it were never so provident, would hardly perform the office of genuine benevolence or sympathy. For if genuine benevolence or sympathy is a portion of our nature, it furnishes, besides the self-regarding motive, a distinct inducement to consult the general good, namely, a disinterested regard for the general welfare or happiness. And without this the motives impelling us to promote the general good would be more defective than they are. But whether benevolence or sympathy be a

simple or ultimate fact, or be engendered by the principle of association on the self-regarding affections, it is one of the motives by which our conduct is determined. And, on either of the conflicting suppositions, the principle of utility, and not benevolence or sympathy, is the measure or test of conduct. For as conduct may be generally useful, though the motive is self-regarding, so may conduct be generally pernicious, though the motive is purely benevolent. Accordingly, in all his expositions of the theory of utility, Bentham assumes or supposes the existence of disinterested sympathy, and scarcely adverts to the hypotheses which regard the origin of the feeling.\*

## LECTURE V.

128. The term law, or laws, is applied to the following objects: to laws proper or properly so called, and to laws improperly so called; to objects which have all the essentials of an imperative law or rule, and are said to resemble (in the narrow sense of the word); and to objects which are wanting in some of those essentials, but to which the term is unduly extended either by reason of analogy or in the way of metaphor.

129. What is here meant by the word resemble, and by the word analogy, may be explained as follows: Resemblance, in the wider sense of the word, includes every degree of likeness between objects or classes of objects. But in the narrower sense and in the language of logic, objects which have all the qualities composing the essence

\* But here I may remark that although not directly an ingredient in the theory of utility, the hypothesis of Hartley is, if well founded, very important in determining the nature of a sound system of education. For as I have shown the importance of motives, which are the springs of action, it follows that the process by which they are generated is of great practical moment, and well deserving of close and minute examination.

of the class, and all the qualities which are the consequences of those composing the essence, resemble.

130. Analogy in the original and proper sense of the word is used to express the relation between two objects or groups of objects, which consists in the fact that one has some of the properties, and the other all the properties, of a class expressly or tacitly referred to.

131. Metaphor, in its larger sense, may be defined as the transference of a term from its primitive signification to objects to which it is applied in a secondary sense. An analogy real or supposed is always the ground of the transference; hence every metaphor is an analogical application of a term, and every analogical application of a term is a metaphor.

132. In common parlance, however, analogy has come to be used in a somewhat narrow and definite sense; namely, to mark the resemblance between natural objects which do not belong to the same species (that is to say, a natural division which we conceive as of a somewhat narrow one), but which do belong to the same genus, order, class, or whatever name may be used to denote a larger natural division of objects. To explain the distinction fully would require a solution of the question—What are the *criteria* of a true classification of natural objects:—a question amongst the most profound of those which are in any way hopeful of solution.\* But the distinction may be suggested by a single illustration. There is a close resemblance between a leaf and the petal of a flower—there is an analogy between both these and the

\* I have here treated the text somewhat freely, but I think fairly representing the author's meaning, in his use of the word analogy. The best *rationale* of classification I have yet seen is given in Mill's "Logic," ch. vii. § 4. Although he does not go quite to the root of the matter, his account of it is very important and suggestive. The question remains, what are the grounds of the induction by which we infer that the common properties of the natural objects which constitute a true kind are indefinite and inexhaustible. Can we, indeed, resolve this without an inquiry into the physical origin of species?—R. C.

breathing organs of an animal. But when a feature of the human face is described as "tip-tilted like the petal of a flower," we are conscious that the expression is based on a remote and fanciful resemblance. Accordingly we say that the expression is a figure of speech. To call the feature in question a "petal" (not because it breathes, but because it is "tip-tilted"), would be a metaphor.

133. Now it is convenient to make a similar distinction between the terms analogy and metaphor as applied to the complex objects comprehended by the term law or laws. Of laws, improperly so-called, some are closely, others are remotely analogous to laws proper. The term law is extended to some by a decision of the reason or understanding. The term law is extended to others by a turn or caprice of the fancy.

I style laws of the first kind laws closely analogous to laws proper. These are merely opinions or sentiments held or felt by men in regard to human conduct. I say that they are called laws by an analogical extension of the term.—I style laws of the second kind laws metaphorical or figurative. I say that they are called laws by a metaphor or figure of speech.

134. I distribute laws proper, with such improper laws as are closely analogous to the proper, under three capital classes.

The first comprises the laws of God—the laws (properly so-called) which are set by God to his human creatures.

The second comprises positive laws—the laws (properly so-called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights.

The third comprises laws of the two following species:  
1. The laws (properly so called) which are set by men, to men, but not by men as political superiors, nor by men, as private persons, in pursuance of legal rights: 2. The

laws which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conduct.—I put laws of these two species into a common class, and I mark them with the common name of positive morality, or positive moral rules.

135. My reasons for using the two expressions “positive law” and “positive morality,” are the following.

There are two capital classes of human laws. The first comprises the laws (properly so called) which are set by men as political superiors, or by men as private persons, in pursuance of legal rights. The second comprises the laws (proper and improper) which belong to the two species immediately above mentioned.

As merely distinguished from the second, the first of those capital classes might be named simply law. As merely distinguished from the first, the second of those capital classes might be named simply morality. But both must be distinguished from the law of God: and, for the purpose of distinguishing both from the law of God, we must qualify the names law and morality. Accordingly I style the first of those capital classes “positive law:” and I style the second of those capital classes “positive morality.” By the common epithet positive, I denote that both classes flow from human sources. By the distinctive names law and morality, I denote the difference between the human sources from which the two classes respectively emanate.

The use which I so make of the term “positive law” is strictly in accordance with the language commonly employed by writers on jurisprudence. The term “positive morality” I have adopted as an expressive phrase to denote a class of objects bearing to morality a relation similar to that which positive law bears to law. For the term morality taken by itself may signify either what I

have just called positive morality, or it may signify that Divine law which is the ultimate test of positive morality as it ought to be.

From the expression positive law, and the expression positive morality, I pass to certain expressions with which they are closely connected.

136. The science of jurisprudence (or, simply and briefly, jurisprudence), is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

Positive morality considered without regard to its goodness or badness, might be the subject of a science closely analogous to jurisprudence. I say "might be": since it is only in one of its branches (namely, the law of nations, or international law), that positive morality, thus considered, has been treated by writers in a scientific or systematic manner. For the science of positive morality, considered without regard to its goodness or badness, current or established language will hardly afford us a name. But, since the science of jurisprudence is not unfrequently styled "the science of positive law," the science in question might be styled analogically "the science of positive morality." The department of the science in question which relates to international law, has actually been styled by Von Martens, a writer of celebrity, "*positives oder practisches Volkerrecht*:" that is to say, "positive international law," or "practical international law." Had he named that department of the science "positive international morality," the name would have hit its import with perfect precision.

The science of ethics (or, in the language of Bentham, the science of deontology) may be defined in the following manner. It affects to determine the test of positive law and morality. In other words, it affects to expound

them as they ought to be; as they would be if they were good or worthy of praise; or if they conformed to an assumed measure.

The science of ethics (or, simply and briefly, ethics), consists of two departments: the one affects to determine the test of positive law, and is styled the science of legislation, or briefly, legislation; the other affects to determine the test of positive morality, and is styled the science of morals, or, briefly, morals.

137. Here I may observe that when we say that a human law is good or bad, or is what it ought or ought not to be, we mean (unless we intimate our mere liking or aversion) this, namely, that the law agrees with or differs from a something to which we tacitly refer it as to a measure or test. According to the theory of utility, which I now assume as sufficiently proved, a human law is good or bad as it agrees or does not agree with the law of God as indicated by the principle of utility.

138. Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or remote analogy, to the following objects.—1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

To distinguish positive laws from the objects now enumerated, is the purpose of the present attempt to determine the province of jurisprudence.

In pursuance of the purpose to which I have now adverted, I stated, in my first lecture, the essentials of a



law or rule (taken with the largest signification which can be given to the term properly).

In my second, third, and fourth lectures, I stated the marks or characters by which the laws of God are distinguished from other laws. And, stating those marks or characters, I explained the nature of the index to his unrevealed laws, or I explained and examined the hypotheses which regard the nature of that index. I made this explanation at a length which may seem disproportionate, but which I have deemed necessary, because these laws, and the index by which they are known, are the standard or measure to which all other laws should conform, and by which they should be tried.

Before proceeding further, I must shortly indicate the essential difference of a positive law (*i.e.* the difference which severs it from a law which is not a positive law), and advert to the reason why I postpone its complete definition until after I have described the remaining sets of objects above mentioned.

Every positive law, or every law, simply and strictly so called, is set by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.

But the full analysis of these expressions occupies so large a space that it will be convenient to postpone it, and I shall accordingly complete the determination of the province of Jurisprudence in the following order:

139. In the present lecture I shall examine the distinguishing marks of those positive moral rules which are laws properly so called; of those positive moral rules which are styled laws or rules by an analogical extension of the term; and of the laws which are styled laws by a metaphor. In doing this I shall also touch on some

subordinate topics, and also (so far as is absolutely necessary to the immediate objects of this lecture) I must anticipate the fuller analysis of sovereignty which I reserve for the following lecture. In the following (the sixth) lecture, I shall conclude the determination of the province of jurisprudence, by explaining the marks or characters which distinguish positive laws. I shall at the same time analyze the expression sovereignty, the correlative expression subjection, and the inseparably connected expression independent political society.

140. (b) In pursuance of the order stated on p. 6, and above adverted to, I proceed to analyze positive morality, describing separately rules of the two species described on p. 84 and there classed together under this name.

141. From the definition of a law, properly so called, contained in the first lecture, it follows that every law properly so called, flows from a determinate source, or emanates from a determinate author.

142. It follows also from the premises stated in the preceding lectures that the laws of God are laws properly so called.

143. Positive laws or laws strictly so called, are established immediately by monarchs or sovereign bodies, as supreme political superiors; by men in a state of subjection as subordinate political superiors; or by subjects as private persons in pursuance of legal rights. In each case they are set directly or circuitously by a monarch or sovereign body. They therefore flow from a determinate source and are laws properly so called.

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

144. The positive moral rules which are laws properly so called, are distinguished from other laws by the union of two marks.—1. They are imperative laws or rules set

by men to men. 2. They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights. They are not commands (either direct or circuitous) of sovereigns in the character of political superiors.

Consequently, they are not positive laws; they are not clothed with legal sanctions, nor do they oblige legally the persons to whom they are set. But being commands (and therefore being established by determinate individuals or bodies), they are laws properly so called; they are armed with sanctions, and impose duties, in the proper acceptation of the terms.

Of positive moral rules which are laws properly so called, some are established by men who are not subjects, or are not in a state of subjection to a monarch or sovereign number.—Of these, some are established by men living in the negative state which is styled a state of nature or a state of anarchy: that is to say, by men who are not members, sovereign or subject, of any political society; others are established by sovereign individuals or bodies, but not in the character of political superiors.

Of laws properly so called which are set by subjects, some are set by subjects as subordinate political superiors; others by subjects as private persons:—meaning by “private persons,” subjects not in the class of subordinate political superiors, or subordinate political superiors not considered as such. Laws set by subjects as subordinate political superiors, are positive laws; they are clothed with legal sanctions, and impose legal duties. They are set circuitously or remotely by sovereigns or states in the character of political superiors. Of laws set by subjects as private persons, some are not established by sovereign or supreme authority—these are rules of positive morality: they are not clothed with legal sanctions, nor do they oblige legally the parties to whom they are

set: others are set or established in pursuance of legal rights residing in the subject authors—and these are positive laws or laws strictly so called; they are clothed with legal sanctions; they are commands of sovereigns as political superiors, although they are set by sovereigns circuitously or remotely.

It appears from the foregoing distinctions, that positive moral rules which are laws properly so called are of three kinds.—1. Those which are set by men living in a state of nature. 2. Those which are set by sovereigns, but not by sovereigns as political superiors. 3. Those which are set by subjects as private persons, and are not set by the subject authors in pursuance of legal rights.

To cite an example of the first kind, would be superfluous labor. A man living in a state of nature may impose an imperative law. And the law being imperative (and therefore preceeding from a determinate source) is a law properly so called; though, for want of a sovereign author, proximate or remote, it is not a positive law but a rule of positive morality.

145. An imperative law set by a sovereign to a sovereign, or by one supreme government to another supreme government, is an example of rules of the second kind. Not being set by a political superior, it is not a positive law or a law strictly so called. But being imperative (and therefore proceeding from a determinate source), it amounts to a law in the proper signification of the term, although it is purely or simply a rule of positive morality.

146. The following imperative laws so far as they are set by their authors as private persons merely, and not in pursuance of legal rights, are examples of rules of the third kind, namely, those set by parents to children; by masters to servants: by lenders to borrowers; by patrons to parasites. Being imperative (and therefore proceeding from determinate sources), they are laws properly so

called. Being set by subjects as private persons, and not in pursuance of legal rights, they are not positive laws but rules of positive morality.

147. Again: A club or society of men, signifying its collective pleasure by a vote of its assembled members, passes or makes a law to be kept by its members severally under pain of exclusion from its meetings. Now if, and so far as it be not made by its authors in pursuance of a legal right, the law so voted and passed is a further example of rules of the third kind.

148. The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion; that is to say, by the general opinion of any class or any society of persons. For example, Some are set or imposed by the general opinions of persons who are members of a profession or calling; others, by that of persons who inhabit a town or province; others, by that of a nation or independent political society; others, by that of a larger society formed of various nations.

A few species of the laws which are set by general opinion have gotten appropriate names.—For example, There are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled the rules of honor, or the laws or law of honor.—There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled the laws set by fashion.—There are laws which regard the conduct of independent political societies in their various relations to one another; or, rather, there are laws which regard the conduct of sovereigns or supreme governments, in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law.

149. Now a law set or imposed by general opinion is a law improperly so called. It is styled a law or rule by an analogical extension of the term. The fact denoted by the expression is the following:—Some indeterminate body or uncertain aggregate of persons regards a kind of conduct with a favorable or unfavorable opinion. In consequence of that sentiment, or the sentiment associated with that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in consequence of that displeasure, it is likely that some party (what party being undetermined) will visit the party provoking it with some evil or another.

150. The body by whose opinion the law is said to be set does not command, either expressly or tacitly. For, since it is not a body precisely determined or certain, it can not, as a body, express or intimate a wish.

A determinate member of the body, who shares in the opinion or sentiment, may doubtless be moved or impelled, by that very opinion or sentiment, to command that conduct of the kind shall be forborne or pursued. The command so expressed or intimated is a law properly so called. But the author is the determinate member, not the general indeterminate body. For example, The so-called law of nations consists of opinions or sentiments current amongst nations generally. These are not laws properly so called. But one supreme government may doubtless command another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which is law improperly so called, this command is a law in the proper signification of the term. Speaking precisely, the command is a rule of positive morality set by a determinate author. For, as no supreme government is in a state of subjection to another, the government commanding does

not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command, though fashioned on the law of nations, would amount to a positive law. Nor does the government which gives the command act as the executor of a command proceeding from the uncertain body—the collective family or aggregate of nations. That government may, however, act as the executor of a command proceeding from a definite number of sovereign states allied under a treaty. In that case there would be a command issuing from the allied states collectively, and enforced by the one government as their minister. This would be still a rule of positive morality and not of positive law, because the government or state which is to be coerced would not (on the hypothesis) be in a state of subjection either to the allied governments collectively, or to the government who for the occasion acted as their minister.

**151.** It follows from the foregoing reasons, that a so-called law set by general opinion is not a law;—is not armed with a sanction; and does not impose a duty, in the proper acceptation of the expressions:—but is closely analogous to a law, in the proper signification of the term, in the following respects:—1. In the case of a law properly so called, the determinate individual or body by whom the law is set wishes that conduct of a kind shall be forborne or pursued. In the case of a law imposed by general opinion, a wish that conduct of a kind shall be forborne or pursued is felt by the uncertain body whose opinion imposes it. 2. If a party obliged by the law proper shall not comply with the wish of the determinate individual or body, he probably will suffer, in consequence of his not complying, the evil or inconvenience annexed to the law as a sanction. If a party liable to their displeasure shall not comply with the wish of

the uncertain body of persons he probably will suffer, in consequence of his not complying, some evil or inconvenience from some party or another. 3. By the sanction annexed to the law proper, the parties obliged are inclined to act or forbear agreeably to its injunctions or prohibitions. By the evil which probably will follow the displeasure of the uncertain body, the parties obnoxious are inclined to act or forbear agreeably to the sentiment or opinion which is styled analogically a law. 4. In consequence of the law properly so called, the conduct of the parties obliged has a steadiness, constancy, or uniformity, which, without the existence of the law, their conduct would probably want. A precisely similar consequence results from the sentiment or opinion which is styled analogically a law.

152. In the foregoing analysis of a law set by general opinion, the meaning of the expression "indeterminate body of persons" is indicated rather than explained. To complete my analysis of a law set by general opinion (and to abridge that analysis of sovereignty which I shall place in my sixth lecture), I will here insert a concise exposition of the important distinction between a determinate, and an indeterminate body of persons.

153. I will first describe the distinction in general or abstract terms, and then illustrate the general description.

If a body of persons be determinate, all the persons who compose it are determined and assignable.

Determinate bodies are of two kinds. Either, 1st. The body is composed of persons determined specifically and individually. It consists of the persons, A. B. C. &c., as individuals determined, each by his specific and appropriate description. Or—2ndly. The body is composed of persons determined generically; in other words, every person who answers to a given generic description, or to any of two or more given generic descriptions, is also a



member of the determinate body; and is such not by reason of his own personal description or character, but by reason of his answering to the given generic description.

If a body be indeterminate, all the persons who compose it are not determined and assignable. Not every person who belongs to it is determined, or capable of being indicated. An indeterminate body consists of some of the persons who belong to another and larger aggregate. But how many of those persons are members of the indeterminate body, or which of those persons in particular are members of the indeterminate body, is not and can not be known completely and exactly.

154. For example, The trading firm or partnership of A. B. and C. is a determinate body of the kind first described above. Every member of the firm is determined specifically, or by a character or description peculiar or appropriate to himself. And every member of the firm belongs to the determinate body, not by reason of his answering to any generic description, but by reason of his bearing his specific or appropriate character.

155. The British Parliament for the time being is a determinate body of the second kind above described. It comprises the one person answering to the description of King [or Queen] not as an individual, but as the person for the time being answering to the generic description contained in the Act of Settlement. It comprises every person belonging to the class of peers who are entitled for the time being to vote in the Upper House. It comprises every person belonging to the class of commoners who for the time being represent the commons in Parliament. And the peers or commoners who are entitled to sit and vote, are so entitled not in their several capacities as individuals; but in their generic character as peers and representatives of the commons, or as respectively an-

swering to the smaller but still generic descriptions of Earl of A. (according to the limitations of his patent), Knight of the Shire of B., or member for the Borough of C. duly returned pursuant to the Royal Writ (or the Speaker's Writ, as the case may be).

156. To exemplify the foregoing description of an indeterminate body, I will revert to the nature of a law set by general opinion. Where a so-called law is set by general opinion, most of the persons who belong to a determinate body or class have certain feelings or sentiments in regard to a kind of conduct. But the number of that majority, or the several individuals who compose it, can not be fixed or assigned with perfect fullness or accuracy. For example, A law set or imposed by the general opinion of a nation, of a legislative assembly, of a profession, or of a club, is an opinion or sentiment, which is held or felt in regard to conduct by most of those who belong to that certain body. But how many of that body, or which of that body in particular, hold or feel that given opinion or sentiment, is not and can not be known completely and correctly. Generally speaking, therefore, an indeterminate body is an indeterminate portion of a body determinate or certain. But a body or class of persons may also be indeterminate, because it consists of persons of a vague generic character. For example, a law set by the general opinion of gentlemen is an opinion or sentiment of most of those who are commonly deemed to be gentlemen; or a class of persons whose generic character can not be described precisely; for whether a given man is a gentleman or not, is a question which different men might answer in different ways.—An indeterminate body may therefore be indeterminate after a twofold manner. It may consist of an uncertain portion of a certain body or class, or of an uncertain portion of an uncertain body or class.

157. A determinate body of persons is capable of corporate conduct. Whether it consist of persons determined by specific characters, or of persons determined or defined by a character or characters generic, every person who belongs to it is determined and may be indicated. In the first case, every person who belongs to it may be indicated by his specific character. In the second case, every person who belongs to it is also knowable; for every person who answers to the given generic description, or who answers to any of the given generic descriptions, is therefore a member of the body. Consequently, the entire body, or any proportion of its members, is capable, as a body, of positive or negative conduct; as, for example, of meeting at determinate times and places; of issuing expressly or tacitly a law or other command; of choosing and deputing representatives to perform its intentions or wishes; of receiving obedience from others, or from any of its own members.

158. An indeterminate body is incapable of corporate conduct, inasmuch as the several persons of whom it consists can not be known and indicated completely and correctly. But in case a portion of its members act or forbear in concert, that given portion of its members is, by that very concert, a determinate or certain body. A law imposed by general opinion may be the cause of a law in the proper acceptation of the term. But the law properly so called, which is the consequent or effect, utterly differs from the so-called law which is the antecedent or cause. The one is an opinion or sentiment of an uncertain body of persons, of a body essentially incapable of joint or corporate conduct. The other is set or established by the positive or negative conduct of a certain individual or aggregate.

159. For simplicity, I have supposed that a determinate body either consists of persons determined by specific

characters, or of persons determined or defined by a generic description or descriptions. But a determinate body may consist partly of persons determined by specific or appropriate characters, and partly of persons determined by a character or characters generic. Let us suppose, for example, that the individual Oliver Cromwell was sovereign or supreme in England; that he convened a House of Commons elected in the ancient manner; and that he yielded a part in the sovereignty to this representative body. Now the sovereign or supreme body formed by Cromwell and the House would have consisted of a person determined or defined specifically, and of persons determined or defined by a generic character or description. A body of persons, forming a body determinate, may also consist of persons determined or defined specifically, and determined or defined moreover by a character or characters generic. A select committee of a body representing a people or nation, consists of individual persons named or appointed specifically to sit on that given committee. But those specific individuals could not be members of the committee, unless each answered the generic description "representative of the people or nation."

It follows from the exposition immediately preceding that the one or the number which is sovereign in an independent political society is a determinate individual person or a determinate body of persons. If the sovereign one or number were not determinate or certain, it could not, as already shown (p. 91 *supra*), command expressly or tacitly, and could not, therefore, be an object of obedience to the subject members of the community.

As closely connected with the matter of the exposition immediately preceding, the following remark concerning supreme government may be put conveniently in the

present place. In order that a supreme government, whether monarchical or otherwise, may possess much stability, and that the society wherein it is supreme may enjoy much tranquillity, the persons who take the sovereignty in the way of succession, must take or acquire by a given generic mode, or by given generic modes, or by reason of their respectively answering to given generic descriptions. This is well illustrated by the history of Rome under the government of the Emperors or "Princes," whose succession did not go according to any generic title.

By a caprice of current language, Laws set by general opinion, or opinions or sentiments of indeterminate bodies, are the only opinions or sentiments that have gotten the name of laws. But an opinion or sentiment held by an individual or by all the members of a determinate body, may be as closely analogous to a law proper, as the opinion or sentiment of an indeterminate body. The foregoing analysis, however, applies only to such laws analogous to laws proper as are set by general opinion.

160. It appears from the expositions in the preceding portion of my discourse, that laws properly so called, with such improper laws as are closely analogous to the proper, are of three capital classes: 1. The law of God. 2. Positive law. 3. Positive morality.

It also appears from the same expositions that positive morality consists of rules of two species: 1. Those positive moral rules which are express or tacit commands, and which are therefore laws in the proper acceptance of the term. 2. Those laws improperly so called (but closely analogous to laws in the proper acceptance of the term) which are set by opinion.

161. The sanctions annexed to and the duties imposed by the laws of God, may be styled religious. The sanc-

tions annexed to and the duties imposed by positive laws, may be styled, emphatically, legal; for the laws to which these sanctions are annexed, these duties imposed, are styled, simply and emphatically, laws or law. Or, as every positive law supposes a *πόλις* or *civitas*, or supposes a society political and independent, the epithet political may be applied to these sanctions and duties. Of the sanctions which enforce compliance with, and the duties imposed by, positive moral rules, some are sanctions and duties properly so called, and others are styled sanctions and duties by an analogical extension of the term; that is to say, some are annexed to and imposed by rules which are laws imperative and proper, and others enforce and are imposed by rules which are laws set by opinion. Since rules of either species may be styled positive morality, the sanctions which enforce compliance with and the duties imposed by rules of either species may be styled moral sanctions—moral duties.

162. To the propositions regarding sanctions and duties stated in the last paragraph, propositions in all respects correlative may be stated in regard to rights which correspond to the duties imposed by the several kinds of rules above mentioned. But inasmuch as the nature of right can not be fully explained until positive law is distinguished from the various related objects, I shall here content myself with the above general observation, leaving the student to apply it for himself when the meaning of the term right has been fully explained to him.

163. The foregoing distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies in the main with a division of laws which is given incidentally, by Locke in his "Essay on the Human Understanding," Book II. Chap. xxviii. The passage of his essay in which the division occurs, is part

of an inquiry into the nature of relation, and is therefore concerned indirectly with the nature and kinds of law. The student, is, however, recommended to consult this chapter, and compare the propositions laid down by Locke in regard to "the Divine law," "the civil law," and "the law of opinion or reputation," with those stated in these lectures.

164. The laws composing those aggregates respectively here styled the law of God, positive law, and positive morality, sometimes coincide, sometimes do not coincide, and sometimes conflict.

165. They coincide, when acts which are enjoined or forbidden by a law of the one class are also enjoined, or are also forbidden, by those of the others respectively. For example, the killing which is styled murder is forbidden by the positive law of every political society : it is also forbidden by a so-called law which the general opinion of the society has set or imposed ; it is also forbidden by the law of God as known through the principle of utility.

166. They do not coincide, when acts which are enjoined or forbidden by a law of the one class are not enjoined or are not forbidden by any law of one of the other classes. For example, though smuggling is forbidden by positive law, and (speaking generally) is not less pernicious than theft, it is not forbidden by the opinions or sentiments of the ignorant or unreflecting : and where the impost or tax is itself of pernicious tendency, smuggling is hardly forbidden by the opinions or sentiments of any. Offenses against the game laws are also in point ; for they are not offenses against positive morality, although they are forbidden by positive law. A gentleman is not generally shunned by gentlemen, though he shoots without a qualification. A peasant who wires hares escapes the censure of peasants, though the

squires, as doing justiceship, send him to the prison and the tread-mill.

167. They conflict, when acts which are enjoined or forbidden by a law of the one class are forbidden or enjoined by some law of one of the other classes. For example, in most of the nations of modern Europe, the practice of dueling is forbidden by positive law. It is also at variance with the law which is received in most of those nations as having been set by the Deity in the way of express revelation. But in spite of positive law, and in spite of his religious convictions, a man may be forced by the law of honor—the opinion of the class to which he belongs—to give or to take a challenge.

168. The simple and obvious considerations to which I have now adverted, are often overlooked by legislators. If they fancy a practice pernicious, or hate it, they know not why, they proceed, without further thought, to forbid it by positive law. They forget that positive law may be superfluous; that the moral or the religious sentiments of the community may already suppress the practice as completely as it can be suppressed; or that, if the practice is favored by those moral or religious sentiments, the strongest possible fear which legal pains can inspire may be mastered by a stronger fear of other and conflicting sanctions.

169. In consequence of the frequent coincidence of positive laws and rules of morality, and of the positive laws and the laws of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality, or on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

170. For example, customary laws are positive laws, fashioned by judicial legislation upon pre-existing cus-



toms. Now, until clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally; though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality. But, because the customs were observed by the governed before they were clothed with sanctions by the sovereign one or number, it is fancied that customary laws exist as positive laws by the institution of the private persons with whom the customs originated.

171. Again: The portion of positive law which is parcel of the law of nature (or, in the language of the classical jurists, which is parcel of the *jus gentium*) is often supposed to emanate, even as positive law, from a Divine or Natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine monarch. To say that it emanates, as positive law, from a Divine or Natural source, is to confound positive law with law whereon it is fashioned, or whereunto it conforms.

172. Before leaving the subject of positive morality, I must note a prevailing tendency to confound what is with what ought to be law or morality, that is, 1st, to confound positive law with the science of legislation, and positive morality with deontology; and 2d, to confound positive law with positive morality, and both with legislation and deontology.

173. A law which exists is a law, though we happen to dislike it, or though it vary from our assumed standard. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle

to insist upon it; but the enumeration of the instances in which it has been forgotten would fill a volume.

174. Blackstone, for example, says, in his "Commentaries," that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he may mean that where human laws conflict with the Divine, we ought to obey the latter rather than the former. If this be his meaning, I assent to it without hesitation, and have only to observe, that the sanctions of the Divine law being infinitely stronger and surer than those of human law, the proposition is identical, and a mere truism.

Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is binding. Now, to say this, is sheer nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I impugn the validity of the sentence, on the ground that it is contrary to the law of God, the ultimate minister of justice, (*videlicet*, the hangman) will demonstrate the inconclusiveness of my reasoning.

But this abuse of language is not merely puerile, it is mischievous; and in times of civil discord the mischief is apparent. To prove by pertinent reasons that a law

is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of utility may be useful. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

175. In another passage of his "Commentaries," Blackstone enters into an argument to prove that a master can not have a right to the labor of his slave. Had he contented himself with expressing his disapprobation, a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.

176. Paley's admired definition of civil liberty appears to me to be open to the same objection. "Civil liberty," he says, "is the not being restrained by any law but that which conduces in a greater degree to the public welfare," and this is distinguished from natural liberty, which is the not being restrained at all. Now, if civil liberty means anything as opposed to natural liberty, it means the liberty which is given and protected by law, which is the same thing as right. But Paley's definition can only apply to "civil liberty" or right as it would be if it conformed to the standard of utility.

177. Grotius, Puffendorf, and the other writers on the so-called law of nations, have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their

own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceive it would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Gottingen, who died only a few years ago,\* is actually the first writer on the law of nations who has avoided that confusion. He distinguished the rules which ought to be received in the intercourse of nations from those which are so received, endeavored to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.

178. Those who know the writings of the Roman lawyers only by hearsay are accustomed to admire their philosophy. Their real merit consists in this, that they have seized the general principles of the Roman law with great clearness and penetration, have applied these principles with admirable logic to the explanation of details, and have thus reduced this positive system of law to a compact and coherent whole. But the philosophy which they borrowed from the Greeks, or fashioned after the examples of the Greeks, is naught. Their attempts to define jurisprudence and to determine the province of the jurisconsult are absolutely pitiable, and it is hardly conceivable how men of such admirable discernment should have displayed such contemptible imbecility,

179. At the commencement of the Digest is a passage attempting to define jurisprudence: "*Jurisprudentia est divinarum atque humanarum rerum notitia, justī atque injustī scientia.*" In the excerpt from Ulpian, which is placed at the beginning of the Digest, it is thus attempted to define the office or province of the jurisconsult: "*Juri operam daturum prius nosse oportet, unde*

\* This, it will be remembered, was spoken in the year 1830 or 1831.

nomen juris descendat. Est autem a justitia appellatum; nam, ut eleganter Celsus definit, jus est ars boni et æqui. Cujus merito quis nos sacerdotes appellet; justitiam namque colimus, et boni et æqui notitiam profite-mur, æquum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pœnarum verum etiam præmiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes."

Were I to present you with all the criticisms which these two passages suggest, I should detain you a full hour. I shall content myself with one. Jurisprudence, if it is anything, is the science of law, or at most the science of law combined with the art of applying it; but what is here given as a definition of it, embraces not only law, but positive morality, and even the test to which both these are to be referred. It therefore comprises the science of legislation and deontology. Further, it affirms that law is the creature of justice, which is as much as to say that it is the child of its own offspring. True, we speak of law and justice as opposed to each other; but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. But, in truth, law is itself the standard of justice. What deviates from any law is unjust with reference to that law, though it may be just with reference to another law of superior authority. The judge who habitually talks of equity or justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity—forgets that he is there to enforce the law of the land, else he does not administer that justice or that equity with which alone he is immediately concerned.

180. This is well known to have been a strong tendency of Lord Mansfield—a strange obliquity in so great

a man. I will give an instance. By the English law, a promise is not binding without a motive of a particular kind, called a consideration. Lord Mansfield, however, overruled the distinct provisions of the law by ruling moral obligation was a sufficient consideration. Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God; that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.

I do not blame Lord Mansfield for having assumed the office of a legislator. I by no means disapprove of what Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. My censure refers to the timid, narrow, and piecemeal manner in which judges have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield employed in the above example, and which would be censurable in any legislator.

181. (c) The analogy borne to a law proper by a law which opinion imposes, lies mainly in this point of resemblance:—In each case a rational being or beings are liable to contingent evil, in the event of their not complying with a known or presumed desire of another. The analogy lies in the resemblance of the improper sanction and duty to the sanction and duty properly so called. That analogy is strong or close. The defect which excludes the law imposed by opinion from the rank of a law proper, merely consists in this: that the wish or desire of its authors has not been duly signified and that

they have no formed intention of inflicting evil or pain upon those who may break or transgress it.

But, beside the laws improperly so called which are set or imposed by opinion, there are others which are related to laws proper by slender or remote analogies. I style these laws metaphorical, or laws merely metaphorical. The analogies by which they are suggested are numerous and different, but these so-called laws have the following common and negative nature. No property or character of any metaphorical law can be likened to a sanction or a duty. Consequently, every metaphorical law wants that point of resemblance which mainly constitutes the analogy between a law proper and a law set by opinion.

182. The most frequent and remarkable of those metaphorical applications is suggested by that uniformity, or that stability of conduct which is one of the ordinary consequences of a law proper. We say, for instance, that the movements of lifeless bodies are determined by certain laws: though, since the bodies are lifeless and have no desires or aversions, they can not be touched by aught which in the least resembles a sanction, and can not be subject to aught which in the least resembles an obligation. We mean that they move in certain uniform modes, and that they move in those uniform modes through the pleasure and appointment of God; just as parties obliged behave in a uniform manner through the pleasure and appointment of the party who imposes the law and the duty.—Again: We say that certain actions of the lower and irrational animals are determined by certain laws. We mean that they act in certain uniform modes; and that, since their uniformity of action is an effect of the Divine pleasure, it closely resembles the uniformity of conduct which is wrought by the authors of laws in those who are obnoxious to the sanctions.\*—In

\* Speaking with absolute precision, the lower animals, or the animals in-

short, whenever we talk of laws governing the irrational world, the metaphorical application of the term law is suggested by this double analogy : 1. The successive and synchronous phenomena composing the irrational world, happen and exist for the most part in uniform series ; which uniformity of succession and co-existence resembles the uniformity of conduct produced by an imperative law. 2. That uniformity of succession and co-existence, like the uniformity of conduct produced by an imperative law, springs from the will and intention of an intelligent and rational author. When an atheist speak of laws governing the irrational world, the metaphorical application is suggested by an analogy still more slender and remote than that which I have now analyzed. He means that the uniformity of succession and co-existence resembles the uniformity of conduct produced by an imperative rule. If, to draw the analogy closer, he ascribes those laws to an author, he personifies a verbal abstraction, and makes it play the legislator. He attributes the uniformity of succession and co-existence to laws set by nature ; meaning, by nature, the world itself ; or, perhaps, that very uniformity which he imputes to nature's commands.

Many metaphorical applications of the term law or rule are suggested by the analogy following.—An imperative law or rule guides the conduct of the obliged, or is a *norma*, model, or pattern, to which their conduct conforms. A proposed guide of human conduct, or a model or pattern offered to human imitation, is therefore, inferior to man, are not destitute of reason. Since their conduct is partly determined by conclusions drawn from experience, they observe, compare, abstract, and infer. But their intelligence is so extremely limited, that, adopting the current expression, I style them irrational. Some of the more sagacious are so far from being irrational, that they understand and observe laws set to them by human masters. But these laws being few and of little importance, I throw them, for the sake of simplicity, out of my account. I say universally of the lower animals, that they can not understand a law, or guide their conduct by a duty.



quently styled a law or rule of conduct, although there be not in the case a shadow of a sanction or a duty.

For instance, we often speak of a law set by a man to himself; meaning that he intends to pursue some given course of conduct as exactly as he would pursue it if he were bound to pursue it by a law. He is not constrained to observe it by aught that resembles a sanction. For though he may fairly purpose to inflict a pain on himself, if his conduct shall depart from the guide which he intends it shall follow, the infliction of the conditional pain depends upon his own will.—Again: When we talk of rules of art, the metaphorical application of the term rules is suggested by the analogy in question. By a rule of art, we mean a prescription or pattern which is offered to practitioners of an art. There is not the semblance of a sanction, nor is there the shadow of a duty. But the offered prescription or pattern may guide the conduct of practitioners, as a rule imperative and proper guides the conduct of the obliged.

183. The preceding disquisition on figurative laws is not superfluous. Figurative laws are not unfrequently mistaken for laws imperative and proper. Nay, attempts have actually been made, and by writers of the highest celebrity, to explain and illustrate the nature of laws imperative and proper, by allusions to so-called laws which are merely such through a metaphor.

184. For instance, an excerpt from Ulpian placed at the beginning of the Pandects, and also inserted by Justinian in the second title of his Institutes, a fancied *jus naturale*, common to all animals, is thus distinguished from the *jus naturale* or *gentium* to which I have adverted above. “*Jus naturale est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium, sed omnium animalium, quæ in terra, quæ in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminæ*

conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius juris peritia censi. Jus gentium est, quo gentes humanæ utuntur. Quod a naturali recedere, inde facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est." The passage here cited discloses a double confusion in the mind of the author, namely, 1st. By the slender analogy above mentioned he is misled into confounding the instincts of animals with laws. 2ndly. He confounds laws with certain motives or affections which are among the ultimate causes of laws.—I must, however, remark that the *jus quod naturæ omnia animalia docuit* is a conceit peculiar to Ulpian: and that this most foolish conceit, though inserted in Justinian's compilations, has no perceptible influence, on the detail of the Roman Law. The *jus naturale* of the classical jurists generally, and the *jus naturale* occurring generally in the Pandects, is equivalent to the natural law of modern writers upon jurisprudence, and is synonymous with the *jus gentium*, or the *ius naturale et gentium*, which I have already adverted to (p. 71, ante). It means those positive laws and those rules of positive morality, which are not peculiar or appropriate to any nation or age, but obtain, or are thought to obtain, in all nations and ages: and which, by reason of their obtaining in all nations and ages, are supposed to be formed or fashioned on the law of God or Nature as known by the moral sense. "Omnes populi" (says Gaius), "qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque jus gentium, quasi quo jure omnes

gentes utuntur." The universal *leges et mores* here described by Gaius, and distinguished from the *leges et mores* peculiar to a particular nation, are styled indifferently, by most of the classical jurists, *jus gentium*, *jus naturale*, or *jus naturale et gentium*. And the law of nature, as thus understood, is not intrinsically absurd. For as some of the dictates of utility are always and everywhere the same, and are also so plain and glaring that they hardly admit of mistake, there are legal and moral rules which are nearly or quite universal, and the expediency of which must be seen by merely natural reason, or by reason without the lights of extensive experience and observation. The distinction of law and morality into natural and positive is a needless and futile subtilty: but is founded on a real and manifest difference, and would be liable to little objection, if it were not supposed to be the offspring of a moral instinct or sense, or of innate practical principles. But, since it is closely allied (as I shall show hereafter \*) to that misleading and pernicious jargon, it ought to be expelled, with the natural law of the moderns, from the sciences of jurisprudence and morality.

185. The following passage is the first sentence in Montesquieu's *Spirit of Laws*. "Leslois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses: et dans ce sens tous les etres ont leurs lois: la Divinité a ses lois; le monde matériel a ses lois; les intelligences supérieures à l'homme ont leurs lois; les betes ont leurs lois; l'homme a ses lois." Now objects widely different, though bearing a common name, are here blended and confounded. The considerations which have been already stated are sufficient to suggest a criticism of the passage which the student should, as a useful exercise, work out for himself.

186. If you read the disquisition in Blackstone on the

\* Lect. xxxii. post.

nature of laws in general, or the fustian description of law in Hooker's Ecclesiastical Polity, you will find the same confusion of laws imperative and proper with laws which are merely such by a glaring perversion of the term. The cases of this confusion are, indeed, so numerous, that they would fill a considerable volume.

187. From the confusion of metaphorical with imperative and proper laws, I turn to a mistake, somewhat similar, which, I presume to think, has been committed by Bentham.

Sanctions proper and improper are of three capital classes:—the sanctions properly so called which are annexed to the laws of God: the sanctions properly so called, which are annexed to positive laws: the sanctions properly so called, and the closely analogous sanctions, which respectively enforce compliance with positive moral rules. But to sanctions religious, legal, and moral, this great philosopher and jurist adds a class which he styles physical or natural sanctions.

When he styles these sanctions physical, he does not intend to intimate that these are the only sanctions which affect the sufferers through means physical or material. Any sanction of any class may reach the suffering party through physical means.

The meaning annexed by Bentham to the expression "physical sanction," may, I believe, be rendered in the following manner.—A physical sanction is an evil brought upon the suffering party by an act or omission of his own. For example: If your house be destroyed by fire through your neglecting to put out a light, you bring upon yourself, by your negligent omission, a physical or natural sanction; supposing, I mean, that your omission is not to be deemed a sin, and that the consequent destruction of your house is not to be deemed a punishment inflicted by the hand of the Deity.

Such physical or natural evils are related by the following analogy to sanctions properly so called: 1. When they are actually suffered, they are suffered by rational beings through acts or omissions of their own. 2. Before they are actually suffered, or whilst they exist in prospect, they affect the wills or desires of the parties liable to them as sanctions properly so called affect the wills of the obliged. The parties are urged to the acts which may avert the evils from their heads, or are deterred from the acts which may bring the evils upon them.

But in spite of the specious analogy at which I have now pointed, I dislike the application of the term sanction to these physical or natural evils: 1. Because they are not suffered, by intelligent beings, as consequences of their not complying with desires of intelligent rational beings. 2. By the term sanction, as it is now restricted, the evils enforcing compliance with laws imperative and proper, or with the closely analogous laws which opinion sets or imposes, are distinguished from other evils briefly and commodiously. If the term were commonly extended to these physical or natural evils, this advantage would be lost. The term would then comprehend every possible evil which a man may bring upon himself by his own voluntary conduct.

188. I close my disquisitions on figurative laws, and on those metaphorical sanctions which Bentham denominates physical, with the following connected remark:

Declaratory laws, and laws repealing laws, ought in strictness to be classed with laws metaphorical or figurative: for the analogy by which they are related to laws imperative and proper is extremely slender or remote. Laws of imperfect obligation (in the sense of the Roman jurists) are laws set or imposed by the opinions of the law-makers, and ought in strictness to be classed with

rules of positive morality. But though laws of these three species are merely analogous to laws in the proper acceptation of the term, they are closely connected with positive laws, and are appropriate subjects of jurisprudence. I separate them accordingly from the classes of improper laws to which in strictness they belong.

## LECTURE VI.

189. ACCORDING to the purpose and order stated at the commencement of these lectures, and adverted to in the last preceding lecture (p. 82), I proceed to explain the marks or characters which distinguish positive laws from the various related objects above described, and to analyze certain expressions which are essential to that distinction.

(d.) The essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus: Every positive law or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. In other words, it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.

It is therefore necessary to analyze the expression sovereignty, the correlative expression subjection, and the inseparably connected expression independent political society.

190. The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters.—1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior:

let that common superior be a certain individual person, or a certain body or aggregate of individual persons.  
2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior.

Or the notions of sovereignty and independent political society may be expressed concisely thus.—If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

191. To that determinate superior, the other members of the society are subject: or on that determinate superior, the other members of the society are dependent. The position of its other members towards that determinate superior, is a state of subjection, or a state of dependence. The mutual relation which subsists between that superior and them, may be styled sovereignty and subjection.

192. Hence it follows, that it is only through an ellipsis that the society is styled independent. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society. By “an independent political society,” or “an independent and sovereign nation,” we mean a political society consisting of a sovereign and subjects, as opposed to a political society consisting entirely of persons in a state of subjection.

193. In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The generality of the given society must be in the habit of obedience to a determinate and common superior: while that determinate person, or determinate body of per-

sons. must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent. I proceed to illustrate and explain the marks which must so unite.

194. 1. The generality or bulk of its members must be in a habit of obedience to a determinate and common superior.

In case the generality of its members obey a determinate superior, if the obedience be rare or transient, and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society. In other words, that determinate superior and the members of that given society do not become thereby an independent political society.

For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those commands, and in spite of that obedience, the French government was sovereign or independent. In spite of those commands, and in spite of that obedience, the French government and its subjects were an independent political society, whereof the allied sovereigns were not the sovereign portion.

Now if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been



changed by the obedience into a society political. And it would not have been changed by the obedience into a society political, because the obedience was not habitual. For instance, while Paris was in the hands of the Commune after the capitulation to the Germans in 1871, and although both the contending parties obeyed occasional commands of the German sovereign, it could scarcely be said that France including Paris formed one political society, still less that France and the German government formed a political society of which the latter was sovereign.

195. 2. In order that a given society may form a society political, habitual obedience must be rendered, by the generality or bulk of its members, to a determinate and common superior. In other words, habitual obedience must be rendered, by the generality or bulk of its members, to one and the same determinate person, or determinate body of persons.

For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is either in a state of nature or is split up into two or more independent political societies. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies. If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved or broken into its individual elements, or into numerous societies of a size so limited that they could hardly be styled societies independent and political. For, as I shall show hereafter, a given independent society would hardly be styled political, in case it fell short of a number which can not be fixed with precision, but which may be called considerable, or not extremely minute.

196. 3. In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior determinate as well as common.

On this position I shall not insist here. For I have shown sufficiently in my fifth lecture that no indeterminate party can command expressly or tacitly, or can receive obedience or submission; that no indeterminate body is capable of corporate conduct.

197. 4. It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must not be habitually obedient to a determinate human superior. He may be habitually affected by so-called laws which opinion sets or imposes, or may render occasional submission to commands of determinate parties. But the society is not independent, although it may be political, if that certain superior habitually obeys the commands of a certain person or body.

Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to make the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. In such circumstances the viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. He, and through him the inhabitants of his province, are in a state of subjection to the sovereign of that larger society. He and the inhabitants of his province are a society political but subordinate.

198. A natural society, or a society in a state of nature,

is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it live in a state of subjection; all live in the negative state which is styled a state of independence.

199. Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. And considered as entire communities, and as connected by mutual intercourse, independent political societies form, it is commonly said, a natural society. To speak more accurately, the several members of the several related societies are placed in the following positions. The sovereign and subject members of each of the related societies form a society political; but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant with the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law; for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sov-

ereigns, of provoking general hostility, and incurring its probable evils in case they shall violate maxims generally received and respected.

200. A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

201. Besides societies political and independent, societies independent but natural, society formed by the intercourse of independent political societies, and societies political but subordinate, there are societies consisting of subjects considered as private persons. A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyze many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose, which is merely to determine the notion of sovereignty, with the inseparably connected notion of independent political society.

202. The definition of the abstract term independent political society (including the definition of the correlative term sovereignty), can not be rendered in expressions of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible

society. It would hardly enable us to determine of every independent society, whether it were political or natural. It would hardly enable us to determine of every political society, whether it were independent or subordinate.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The generality or bulk of its members must be in a habit of obedience to a certain and common superior; while that certain person, or certain body of persons, must not be habitually obedient to a certain person or body. It is obvious that the term bulk or generality—habit and habitually—are so wanting in precision as not always to furnish a certain test whether or not a given society is independent.

203. I proceed to illustrate this. And first as to the positive test or mark of independent political society. In some cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty, and without a moment's hesitation, we should say that the generality of its members were in a habit of obedience or submission to a certain and common superior, and should accordingly pronounce the society political. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization. In other cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent and broken, that, without a moment's difficulty, and without a moment's hesitation, we should pronounce the society natural; we should say the generality of its members were not in a habit of obedience to a certain and common superior. Such, for example, is the state

of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

But in the cases of independent society which lie between the extremes, we should hardly find it possible to determine with absolute certainty, whether the generality of its members did or did not obey one and the same superior, or whether the general obedience to one and the same superior was or was not habitual. For example: During the height of the conflict between Charles the First and the Parliament, the English nation was broken into two distinct societies; each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the bulk of the nation were habitually obedient to the body which affected sovereignty? And in the meantime what was the class of the society which was formed by the English people? These are questions which it would be impossible to answer with certainty, although the facts of the case were precisely known.

204. Next, as the negative mark of independent political society.—Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a habit of obedience to a determinate person or body?

For example: Previously to the war of 1866, which

ended with Sadowa, the smaller German states which now form part of the German Empire, may be said to have been independent. For although they obeyed the occasional commands of a superior, whether of Prussia, Austria, or the Bund, it was not definitely ascertained to which of those authorities obedience was due, still less can it be said of some of these states (*e.g.* Saxony), that they were in the habit of obedience to a definite and certain superior. After the conclusion of the war of 1870-71, the smaller states comprised in the German Empire can hardly be said to be independent. But it would be difficult to state with precision the time at which the habit of obedience to the supreme federal Government, whether under the name of the North German Confederation, or the German Empire, became established.

The difficulties which I have labored to explain, often embarrass the application of those positive moral rules which are styled international law.

205. For example: At the commencement of the war of Secession in America, was the Union a Political Society? Were the Seceding States rebels or Confederate Independent States at war with the Union? These were at the time, and long remained embarrassing and difficult questions to Governments who looked on from a distance.

This difficulty presents itself under numerous forms in international law; indeed, almost the only difficult and embarrassing questions in that science arise out of it. And law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions reasonable time, reasonable notice, reasonable diligence? than the line of demarcation which distinguishes libel and fair criticism; or that which constitutes a violation of copyright; or that degree of men-

tal aberration which constitutes idocy or lunacy? In all these cases, as in the case in point, the difficulty arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived.

I have tacitly supposed, during the preceding analysis, that every independent society forming a society political, possesses the essential property which I will now describe.

206. In order that an independent society may form a society political, it must not fall short of a number which can not be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a natural, and not a political society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

207. Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Although the society has all the marks expressly mentioned in my definition, it would be ridiculous to style such a society a society political and independent, the father and chief a monarch or sovereign, or the obedient mother and children subjects. "*La puissance politique*" (says Montesquieu), "*comprend nécessairement l'union de plusieurs familles.*"

In the case of tribes such as those who live by hunting or fishing in the woods or on the coasts of New Holland; and those tribes of Indians who range the unsettled parts of the North American continent, we should deny the title "independent political society," because the bond which connects the congeries of families of which they consist



is too slight to say that they render habitual obedience to any certain superior, although they may on occasions unite in obedience to a leader for warlike purposes. If we admitted the term "independent political society" to describe a society, however small, which united the conditions above mentioned, we should say that these tribes consisted of a congeries of independent political communities. They are, strictly speaking, a congeries of groups having all the marks of independent political societies except size. They are commonly included in the expression natural society, although that expression as above defined strictly applies to a congeries of independent units.

The lowest possible number which will satisfy the condition now under consideration can not be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or even a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

The condition immediately above considered, it will be observed, introduces a further element of vagueness into this definition of independent political society, and adds to the difficulties which, as I have already stated, are owing to the vagueness of the terms necessarily employed.

But here I must briefly remark, that the property which I have last described is not an essential property of subordinate political society. If the independent society of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state for political or public purposes is a society or body politic; although it may consist of a very small number of members.

208. Having tried to determine the notion of sovereignty, with the implied or correlative notion of independent political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

209. Distinguishing political from natural society, Bentham, in his *Fragment on Government*, thus defines the former: "When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society." And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should be capable of indefinite duration.—Considered as a definition of independent political society, this definition is defective, by the omission of the negative mark; namely, that the sovereign is not habitually obedient to another. It is also a defective definition of political society in general. For before we can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not

independent is a member or constituent parcel of a political society which is. The powers or rights of subordinate political superiors are merely emanations of sovereignty, particles of sovereignty committed by sovereigns to subjects.

210. According to the definition of independent political society which is stated or supposed by Hobbes, in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But as I have already remarked, this can hardly be said of any existing society. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations.

211. In his great treatise on international law, Grotius defines sovereignty in the following manner: "*Summa potestas civilis illa dicitur, cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi. Alterius cum dico, ipsum excludo, qui summa potestate utitur; cui voluntatem mutare licet.*" Now, in order to an adequate conception of the nature of international morality, as well as in order to an adequate conception of the nature of positive law, the positive as well as the negative of the two essential marks of sovereignty, stated in my definition, must be noted or taken into account. But the positive essential of sovereign power is not inserted by Grotius in his definition. And the negative essential is stated inaccurately. If, as the definition supposes, perfect or complete independence be

of the essence of sovereign power, there is not in fact the human power to which the epithet sovereign will apply with propriety: Every government, let it be never so powerful, renders occasional obedience to commands of other governments; defers frequently to those opinions and sentiments which are styled international law; and defers habitually to the opinions and sentiments of its own subjects. Not to be in the habit of obedience to another constitutes all the independence that a government can possibly enjoy.

212. According to Von Martens of Gottingen (the writer on positive international law already referred to), "a sovereign government is a government which ought not to receive commands from any external or foreign government."—Of the conclusive and obvious objections to this definition of sovereignty the following are only a few: 1. If the definition in question applies to sovereign governments, it will also apply to a subordinate government which holds its power at the will of and as a trustee for its own sovereign. 2. Whether a given government be or be not supreme, is a question of fact. A government reduced to subjection is actually a subordinate government, although, according to the morality which obtains between states, it ought to be sovereign or independent. 3. It can not be affirmed absolutely of a sovereign or independent government, that it ought not to receive commands from foreign or external governments. Although the morality which actually obtains between states as well as that international morality which is commended by general utility, forbids excessive intermeddling by independent governments with other independent governments, yet, according to both systems of morality, no independent government ought to be freed completely from the supervision and control of its fellows. 4. In this definition by Von Martens (as in that which is given

by Grotius), there is not the shadow of an allusion to the positive character of sovereignty.

213. In order further to elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will make a few concise remarks upon the following subjects or topics.—1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary bounds which limit, or are supposed to limit, the power of sovereigns. 3. The origin of government, with the origin of political society; or the causes of the habitual obedience which is rendered to the sovereign by the bulk of subjects.

214. 1. An independent political society is divisible into two portions, namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. For unless every member of a political society were adult and of sound mind, it would be impossible for the sovereignty to reside in all the members. The existence of such a society is so improbable, that, with this passing notice, I throw the idea of it out of my account.

215. When the sovereign portion consists of a single member, the supreme government is properly a monarchy, or the sovereign is properly a monarch.\* When

\* In every monarchy, the monarch renders habitual deference to the opinions and sentiments held and felt by his subjects. But in almost every monarchy, he defers especially to the opinions and sentiments, or he consults especially the interests and prejudices, of some especially influential though narrow portion of the community. If the monarchy be military, or if the main instrument of rule be the sword, this influential portion is the military class generally, or a select body of the soldiery. If the main instrument of rule be not the sword, this influential portion commonly consists of nobles, or of nobles, priests, and lawyers. For example: In the Roman world, under the sovereignty of the princes or emperors, this influential portion was formed by the standing armies, and, more particularly, by the Prætorian guard: as, in the Turkish empire, it consists, or consisted of the corps of Janizaries. In France, after the kings had become sovereign, and before the great revolution, this influential portion was formed by the

the sovereign portion consists of a number of members. the supreme government may be styled an aristocracy (in the generic meaning of the expression). And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy or government of one, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy or government of a number, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. Considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts.

216. Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms, namely, oligarchies, aristocracies (in the specific meaning of the name), and democracies. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an oligarchy. If the proportion be deemed small, but not extremely small, the supreme

nobility of the sword, the secular and regular clergy, and the members of the parliaments or higher courts of justice.

Hence it has been concluded, that there are no monarchies properly so called: that every supreme government is a government of a number: that in every community which seems to be governed by one, the sovereignty really resides in the seeming monarch or autocrat, with that especially influential though narrow portion of the community to whose opinions and sentiments he especially defers. This, though plausible, is an error, arising from a confusion of laws properly so called with laws improperly imposed by opinion. The habitual independence which is one of the essentials of sovereignty, is merely habitual independence of laws imperative and proper. By laws which opinion imposes, every member of every society is habitually determined.

government is styled an aristocracy (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled popular, or is styled a democracy. But these three forms of aristocracy (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it, and the line of demarcation, vague as it necessarily is, shifts according to the prepossessions of the person who uses the respective phrases.

The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

217. Other distinctions between aristocracies are founded on differences between the modes wherein the sovereign number may share the sovereign powers.

For the sovereign number is commonly a mixed or heterogeneous body, or a body of individual persons whose political characters are different. And the various constituent members of the heterogeneous and sovereign body may share the sovereign powers in any of infinite modes.

The infinite forms of aristocracy which result from those infinite modes, have not been distinguished systematically by generic and specific names. But some of them have been distinguished broadly from the rest, and marked with the common name of limited monarchies.

218. In all or most of the governments which are styled limited monarchies, a single individual shares the sovereign powers with an aggregate or aggregates of individuals; the share of that single individual, be it greater or less, surpassing or exceeding the share of any of the other individuals who are also constituent mem-

bers of the supreme and heterogeneous body. And by that pre-eminence of share in the sovereign or supreme powers, and (perhaps) by precedence in rank or other honorary marks, that single individual is distinguished, more or less conspicuously, from any of the other individuals with whom he partakes in the sovereignty. But he is not a monarch in the proper acceptation of the term. He is not sovereign, but is one of a sovereign number. Considered singly, he lives in a state of subjection, and is subject to the sovereign body of which he is merely a limb.

219. Limited monarchy, therefore, is not monarchy. It is one or another of those infinite forms of aristocracy which result from the infinite modes wherein the sovereign number may share the sovereign powers. And, like any other of those infinite forms, it belongs to one or another of those three forms of aristocracy which I have noticed in a preceding paragraph.

As meaning monarchical power limited by positive law, the name limited monarchy involves a contradiction in terms. For a monarch properly so called is supreme, and supreme power is incapable of legal limitation. It is true that the power of an aristocracy, styled a limited monarchy, is limited by positive morality, and also by the law of God. But, the power of every government being limited by those restraints, the name limited monarchy, as pointing to those restraints, is not a whit more applicable to such aristocracies as are marked with it than to monarchies properly so called. Its application, too, is capricious, and indeed is commonly determined by a purely immaterial circumstance: by the nature of the title, or the nature of the name of office, which that foremost member of the mixed aristocracy happens to bear. For example: The title of *βασιλεύς*, *rex*, or king, is commonly borne by monarchs in the proper



acceptation of the term ; and since our own king happens to bear that title, our own mixed aristocracy of king, lords, and commons, is usually styled a limited monarchy. If his share in the sovereign powers were exactly what it is now, but he were called protector, president, or stadtholder, the mixed aristocracy of which he is a member would probably be styled a republic. And for such verbal differences between forms of supreme government has the peace of mankind been frequently troubled by ignorant and headlong fanatics.\*

\* The present is a convenient place for the following remarks upon terms.

The term "sovereign," or "the sovereign," applies to a sovereign body as well as to a sovereign individual. "*Il sovrano*" and "*le souverain*" are used by Italian and French writers with this generic and commodious meaning. "*Die Obrigkeit*" (the person or body over the community) is also applied indifferently, by German writers, to a sovereign individual or a sovereign number: though it not unfrequently signifies the aggregate of the political superiors who in capacities supreme and subordinate govern the given society. But though "sovereign" is a generic name for sovereign individuals and bodies, it is not unfrequently used as if it were synonymous with "monarch" in the proper acceptation of the term. "Sovereign," as well as "monarch," is also often misapplied to the foremost individual member of a so-called limited monarchy.

"Republic," or "commonwealth," has the following amongst other meanings.—1. Without reference to the form of the government, it denotes the main object for which a government should exist;—the weal or good of an independent political society. 2. Without reference to the form of the government, it denotes a society political and independent. 3. Any aristocracy, or government of a number, which has not acquired the name of a limited monarchy, is commonly styled a republican government, or, more briefly, a republic. But the name 'republican government,' or the name "republic," is implied emphatically to such of the aristocracies in question as are deemed democracies or governments of many. 4. "Republic" also denotes an independent political society whose supreme government is styled republican.

The meanings of "state" or "the state," are numerous and disparate: of which numerous and disparate meanings the following are the most remarkable.—1. "The state" is usually synonymous with "the sovereign," the individual or body bearing the supreme power. This is the meaning which I annex to the term, unless I employ it expressly with a different import. 2. By the Roman lawyers, the expression "*status reipublicæ*" seems to be used in two senses:—it is either synonymous with "republic," in the first of the four meanings enumerated above; or it denotes the individual or body which is sovereign in a given society, together with the subject individuals and subject bodies who hold political rights from that sovereign one or number. 3. Where a sovereign body is compounded of minor bodies, or of one individual person and minor bodies, those minor bodies are not unfrequently styled "states" or "estates." 4. An independent

220. To the foregoing brief analysis of the forms of supreme government, I append a short examination of the four following connected topics. 1. The exercise of sovereign powers, by a monarch or sovereign body, through political subordinates or delegates representing their sovereign author. 2. The distinction of sovereign and other political powers into legislative and executive. 3. The true natures of the communities or governments which are styled by writers on positive international law half-sovereign states. 4. The nature of a composite state, or a supreme federal government; with the nature of a system of confederated states, or a permanent confederacy of supreme governments.

221. It is conceivable that in an independent political society of the smallest possible magnitude, inhabiting a territory of the smallest possible extent, and living under a monarchy or an extremely narrow oligarchy, all the supreme powers (save those committed to subjects as private persons) might be exercised directly by the monarch or supreme body. But by every actual sovereign (whether an individual or a number), some of those powers are exercised through political subordinates or delegates representing their sovereign author. This is practically necessary for numerous reasons. For example: If the number of the society be large, or if its territory be large, although its number be small, the quantity of work to be done in the way of political government is more than can be done by the sovereign without the assistance of ministers. If the society is governed by a political society is often styled a "state," or a "sovereign and independent state."

An independent political society is often styled a "nation," or a "sovereign and independent nation." But the term "nation," or the term "gens," is used more properly with the following meaning. It denotes an aggregate of persons, exceeding a single family, who are connected through blood or lineage, and perhaps through a common language. And, thus understood, a "nation" or "gens" is not necessarily an independent political society.

popular body, especially if dispersed through a wide area, there is, by reason of the bulk and dispersion of that body, some of the business of government which can not be done by the sovereign without the intervention of representatives. Some of the business of government, also, the body is prevented from performing by the private avocations of its members.

222. In most or many of the societies whose supreme governments are monarchical, oligarchical, or aristocratical (in the specific meaning of the name), many of the sovereign powers are exercised by the sovereign directly. This is also the case even in some of the societies whose supreme governments are popular. For example: In the democracies of ancient Greece and Italy, the sovereign people or number, formally assembled, exercised directly many of its sovereign powers. And in some of the Swiss Cantons whose supreme governments are popular, the sovereign portion of the citizens, regularly convened, performs directly much of the business of government.

223. But in many of the societies whose supreme governments are popular, the sovereign or supreme body (or any numerous body forming a component part of it) exercises through representatives, whom it elects and appoints, the whole, or nearly the whole, of its sovereign or supreme powers. In our own country, for example, the commons (a name specifically applied to those commoners who share the sovereignty with the King and the Peers) exercise through representatives the whole of their sovereign powers, except their sovereign power of electing and appointing representatives to represent them in the British Parliament.

224. Where a sovereign body (or any smaller body forming a component part of it) exercises through representatives the whole of its sovereign powers, it may

delegate its powers in either of two modes. 1. It may delegate them subject to a trust or trusts. 2. It may delegate them absolutely or unconditionally, so that the representative body, during the period for which it is elected and appointed, occupies completely the place of the electoral, and is invested completely with the sovereign character of the latter.

225. For example: The commons delegate their powers to the members of the commons' house, in the second of the above-mentioned modes; and (as it has been supposed) so absolutely that the commons' house might concur with the king and the peers in defeating the principal object of its election, *e.g.*, by passing an Act extending its own duration for twenty years. When Parliament is dissolved, or the period for which a member is elected expires, the delegated share in the sovereignty reverts to the delegating body, so far at least as regards the choice of new representatives.

226. If the commons, instead of delegating their powers in the second of the above-mentioned modes, had delegated them subject to a trust, that trust would have imposed upon the representative body either a legal or a moral obligation. That is to say, the trust would be enforced either by legal or by merely moral sanctions. The representative body would be bound by a positive law or laws; or merely by a fear that it may offend the bulk of the community, in case it shall break the engagement which it has contracted with the electoral.

227. This last is really the position occupied by the members of the commons' house. Adopting the language of most of the writers who have treated of the British Constitution, I have supposed that the present parliament, or the parliament for the time being, is possessed of the sovereignty. But, speaking accurately, the members of the commons' house are merely trustees

for the body by which they are elected and appointed; and, consequently, the sovereignty always resides in the king and the peers, with the electoral body of the commons. The supposition that the powers of the commons are delegated absolutely to the members of the commons' house probably arose from the following causes. 1. The trust imposed by the electoral body upon the body representing them in parliament, is tacit rather than express; consequently the trust is general and vague. The representatives are merely bound, generally and vaguely, to abstain from any such exercise of the delegated sovereign powers as would tend to defeat the purposes for which they are elected and appointed. 2. The trust is simply enforced by moral sanctions. In other words, that portion of constitutional law which regards the duties of the representative towards the electoral body, is positive morality merely.

228. From the exercise of sovereign powers by the sovereign directly, and also by the sovereign through political subordinates or delegates, I pass to the distinction of sovereign, and other political powers, into such as are legislative, and such as are executive or administrative.

229. It seems to be supposed by many writers, that legislative political powers and executive political powers may be distinguished with an approach at least to precision; and that in every society whose government is a government of a number, the legislative sovereign powers and the executive sovereign powers belong to distinct parties. According, for example, to Sir William Blackstone, the legislative sovereign powers reside in the parliament: that is to say, in the tripartite sovereign body formed by the king, the members of the house of lords, and the members of the house of commons. But, according to the same writer, the executive sovereign powers reside in the king alone.

230. Now, on a moment's consideration it will appear that the distinction is not precise. So far as political powers can be described by the words legislative and executive in any determinate meaning, that meaning must be this. Legislative powers are powers of establishing laws, and issuing other commands; administrative powers are powers of administering or carrying into operation laws or other commands already established or issued. If this be the meaning of the words, they can not accurately describe two opposed classes of sovereign powers. For a great part of the administration of existing law consists in making laws. For instance, the decree of a Court of Justice is in many cases a law proper, laying down a rule, or prescribing to the parties a course of conduct. And the judgment of a Court of Justice in a particular case, so far as the Court (exercising delegated powers of sovereignty) thereby intimate that they will in future adhere to the precedent established by the case, is a law just as much as an Act of Parliament is a law. Rules of procedure, too, laid down for the guidance of Courts of Justice, (whether made by the Courts themselves or by Parliament) are at once laws and means of administering laws.

231. That the legislative sovereign powers and the executive sovereign powers belong, in any society, to distinct parties, is a supposition easily shown to be false by the following, amongst other, examples: 1. The power of making laws subsidiary to the execution of other laws is seldom confined exclusively either to what is commonly called the legislative, or to what is called the administrative branch of government. Whether, therefore, this function be deemed legislative or administrative, the fallacy of the supposition in question is equally apparent. 2. In almost every society, judicial powers commonly esteemed executive or administrative,

are exercised directly by the supreme legislature. The Roman emperors or princes issued not only edictal constitutions, but *decretes* or judgments. In *libera republica*, or before the virtual dissolution of the free or popular government, the sovereign Roman people, then the supreme legislature, was a High Court of Justice for the trial of criminal causes. In this country the powers of supreme judicature inhering in the modern parliament consisting of the king and the upper and lower houses have, I believe, never been brought into exercise; for in making the *ex post facto* statutes called Acts of attainder, parliament is not properly a Court of Justice. But the ancient parliament, formed by the king and the barons, of which the modern is the offspring, was the ultimate court of appeal as well as the sovereign legislature. The Scottish parliament retained its character as an original court of jurisdiction until a comparatively late period,\* and retained its character as a court of ultimate appeal (although not without controversy)† up to the Union of the Kingdoms in 1707. To the present time, important executive or administrative powers have been exercised by each of the houses, in whom is vested, conjointly with royalty, the greatest part, if not the whole, of the sovereign powers. The House of Lords exercise jurisdiction as the ultimate court of appeal (although by the Supreme Court of Judicature Act of 1873 a term has been assigned to its functions as an English Court of Appeal); and until the Parliamentary Elections Act, 1868 by which the power of trying the validity of an election was

\* At all events so late as the institution of "the Session" by James I., in 1425.

† The process was called "protestation for remeid of law," and forms a curious episode in the history of the Scottish Bar. An account of it will be found in an address on the Historical Study of the Law, delivered to the Juridical Society of Edinburgh, in 1863, by the Right Hon. John Inglis, then Lord Justice-Clerk. (Blackwood and Sons, Edinburgh and London 1863.)

committed to subordinate judges, that judicial power was exercised by the lower house through a committee of its members. 3. The sovereign administering the law through subordinate courts of justice is the author of that measureless system of judge-made law or rules of law made judicially, which has been established by those subordinate tribunals as directly exercising their judicial functions. In this country, where the rules of judge-made law hold a place of almost paramount importance in our legal system, it can hardly be said that Parliament (the so-called legislature) is the author of those rules. It may, indeed, be said, that Parliament by not interfering permits them to be made, and, by not repealing them by statute, permits them to exist. But, in truth, Parliament has no effective power of preventing their being made, and to alter them is a task which often baffles the patience and skill of those who can best command parliamentary support.\*

232. Of all the larger divisions of political power, that into supreme and subordinate is perhaps the only precise one, and is possibly sometimes the one really present to the minds of those who speak of the distinction between legislative and executive powers as if it were a precise division. Supreme political powers are those, infinite in number and kind, which, partly brought into exercise and partly lying dormant, belong to a sovereign or state; subordinate political powers are those which are delegated to political subordinates, being either persons merely subordinate or persons who are themselves immediate participants in the supreme power.

\* Austin instances as legislative powers exercised by the king and not by Parliament, the power of making articles of war, and the power exercised through subordinate judges of making rules of procedure. But these are, at all events in the present day, not sovereign powers exercised independently of Parliament, but powers of legislation formally delegated by Parliament, viz., by the annual Mutiny Act, and by the various statutes relating to procedure. Of a similar nature are various Orders in Council, &c., &c. made under authority of various Acts of Parliament.—R. C.



233. There were formerly in Europe many of the communities or governments which are styled by writers on positive international law half-sovereign states. In consequence of the mighty changes wrought by the French Revolution, such communities or governments have wholly or nearly disappeared ; and they are here adverted to not so much for their intrinsic importance as because the epithet half-sovereign obscures the essence of sovereignty and independent political society, by suggesting the notion that these governments are at once sovereign and subject.

According to writers on positive international law, a government half or imperfectly sovereign has most of the political and sovereign powers which belong to a supreme government, and in particular in regard to its foreign alliances and the making war or peace. But notwithstanding this, the government, or a member of the government of another political society, has political power over it. For example : In the Germanico-Roman Empire, the German governments holding of the empire *in capite* were deemed imperfectly sovereign in regard to that general government which consisted of the Emperor and themselves as forming the Imperial Diet. For, although in their foreign relations they were independent or nearly so, they were bound (in reality or show) by laws of that general government ; and the political communities in which they were half-supreme were subject to the appellate jurisdiction of the imperial tribunals.

234. Now every government which is deemed imperfectly supreme will be found on analysis to be, in relation to the government to which it is deemed to be half-subject, in one or another of the following predicaments. It is either, 1st, wholly subject ; or, 2ndly, perfectly independent ; or, 3dly, in its own community it is jointly sovereign with the other, and is therefore a constitu-

ent member of a government supreme and independent.

A government is in relation to another in the first of those three predicaments, when the political powers of the one government are exercised entirely and habitually at the pleasure and bidding of the other. For instance, the various so-called independent princes in India, from Cape Comorin to the Himalayas, from the Bay of Bengal to the Khyber Pass, are in this position in relation to the British government of India. The power which they exercise over the people in their respective territories is held virtually by the will of the *Sirkar*—the acknowledged paramount authority of the British government—and they habitually obey the commands of that government conveyed through the British Superintendent or Resident. An instance of a government standing in relation to another in the second of those predicaments is furnished by the Great Frederic of Prussia, who, as prince-elector of Brandenburg, was deemed half or imperfectly sovereign in respect of his feudal connection with the German empire. Potentially and in practice he was thoroughly independent of the imperial government. Being in the habit of thrashing its armies, he was not in the habit of submission to his seeming feudal superior. Instances of governments standing to another in the third predicament are furnished by the domestic governments of the communities now united under the leadership of the King of Prussia as Emperor of Germany, and by those British Colonies which possess independent legislatures in their respective relations to the Imperial Government.

For the reasons above given, I believe that no government is sovereign and subject at once: nor can be properly styled half or imperfectly supreme.\*

\* The application of the epithet half-sovereign is capricious. For

235. It frequently happens that one government, political and sovereign, arises from a federal union of several political governments. By some of the writers on positive international law, such a sovereign government is styled a composite state. It would be more aptly, as well as more popularly, styled a supreme federal government. It also frequently happens that several independent political societies are compacted by a permanent alliance. By some of these writers the several societies or governments so compacted are styled a system of confederated states. But they might be more aptly styled a permanent confederacy of supreme governments.

I advert to the nature of a so-called composite state, and to that of a system of confederated states, 1st, in order to show that the former of these objects is no exception to the rule that in an independent political society the sovereign is either one individual or one body of individuals; and 2ndly, in order to obviate the confusion which is apt to arise from the fallacious resemblance which exists between these widely different objects.

236. 1. In the case of a so-called composite state or supreme federal government it will easily be seen that the common or general government is not sovereign or supreme; and also that no one of the several governments is sovereign or supreme, even in the general so-

example: No one has applied the term to those communities wherein the Roman Catholic is the prevalent and established religion, and where legislative and judicial powers are exercised by the Pope. It seems to be supposed by the writers in question, that in every such political community, either those powers are merely exercised by the authority of the domestic government, or the domestic government and the Pope are jointly sovereign. On the former of those suppositions the domestic government is perfectly sovereign; on the latter the domestic government is a constituent member of a government supreme and independent. According, indeed, to some of such writers, although those powers are not exercised by the permission or authority of the domestic government, yet if the exercise be confined to matters strictly ecclesiastical, the sovereignty of the domestic government is not impaired. But those powers, whether in matters ecclesiastical or not, are still legislative and judicial powers. And how is it possible to distinguish matters which are strictly ecclesiastical from those which are not?

ciety of which it is the immediate chief. For if the general government were supreme, each of the several governments considered in that character would be purely subordinate. And if the several governments were severally sovereign, they would not be members of a composite state, although as I shall show presently, they would form a system of confederated states.

The sovereignty of each of the united societies, and also of the larger society, arising from the union of all in fact, resides in the united governments as forming one aggregate body; that is to say, as signifying their joint pleasure or the joint pleasure of a majority of their number agreeably to the form determined by the federal compact. By that aggregate body the powers of the general government were conferred and determined; and by that aggregate body its powers may be revoked, abridged, or enlarged. By the same aggregate body, also, the powers of the several governments forming its constituent members are conferred, and may be revoked, abridged, or enlarged. For the powers of the general government are so many powers subtracted from the powers of the several governments; and, therefore, when that is determined these are deducible by necessary inference.

To illustrate the nature of a supreme federal government, I will add the following remark. Neither the immediate tribunals of the common or general government, nor the immediate tribunals of the several or domestic governments, are bound or empowered to execute every command that the general government may issue. The political powers of the common or general government are merely those portions of their several sovereignties which the several governments, as parties to the federal compact have relinquished and conferred upon it. The competence of the general government to make laws and

to issue other commands may and ought to be examined by its own immediate tribunals, and also by the domestic tribunals of the several governments. And if, in making a law or issuing a command, the general government exceed the limited powers which it derives from the federal compact, both the tribunals of the general government and of the several governments are empowered and bound to disobey.

The supreme government of the United States of America agrees (I believe) with the foregoing general description of a supreme federal government. I believe that the common government, or the government consisting of the Congress and the President of the United States, is merely a subject minister of the united states' governments. I believe that no one of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body; meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which (the union apart) is properly sovereign therein. If the several immediate chiefs of the several united states were respectively single individuals, or were respectively narrow oligarchies, the sovereignty of each of the states, and also of the larger state arising from the federal union, would reside in those several individuals, or would reside in those several oligarchies, as forming a collective whole.\*

\* It will be recollected that the lectures (from which the above paragraph is transcribed entire), were delivered in 1830-1832, long before the war of 1860-64, the result of which was to give a new and very conclusive demonstration of the sovereignty of the Union, which is here maintained by Austin to have been the intention of the founders, on a true construction of

237. 2. A system of confederated states is broadly distinguished from a composite state or supreme federal government by the following essential difference. In the case of a composite state, the several united societies form one independent society or are severally subject to one sovereign body. In the case of a system of confederated states, each of the several societies is an independent political society, and each of their several governments is properly sovereign or supreme. Although the aggregate of the several governments was the framer of the federal compact and may subsequently pass resolutions concerning the entire confederacy, neither the terms of that compact nor such subsequent resolutions are enforced in any of the societies by the authority of that aggregate body. They owe their legal effect, in any one of those several societies, to laws and other commands which the government of that society makes or fashions upon them, and which of its own authority it addresses to its own subjects. In short, a system of confederated states can not be distinguished by any definite mark from a number of independent governments connected by an ordinary alliance. All that can be said is, that the compact is intended to be permanent, and that the ends and purposes of the compact are more numerous and complicated than those of a simple alliance.

238. I believe that the German Bund or Confederation, which succeeded to the ancient Empire, was merely a system of confederated states; that the Diet of that period was merely an assembly of ambassadors from several confederated but severally independent governments; and that the resolutions of the Diet were merely articles of agreement spontaneously adopted by each of

the written Constitution framed by deputies from the several states in 1787.—R. C.

the confederated governments, and which owed their legal effects in any one of the several compacted societies merely to laws and commands fashioned on them by its own domestic sovereign. The Diet, as such, never really possessed any power of enforcing its own decrees. What was called federal execution took place merely when Prussia or Austria, or both, with such of the smaller states as chose or were influenced by fear or example of the stronger power, found it convenient to unite and enforce a command in conformity with the resolution of the Diet.

The nature of the Bund is strongly illustrated by the events which preceded its breaking up in 1866. The subsequent development of the North German Confederation and its transformation by the course of events into a composite state, under the leadership of the King of Prussia (with the title of the Emperor of Germany), are matters fresh in the recollection of every one, and further illustrate the broad difference between the two classes of objects here considered.

**239.** The Swiss Confederation may probably be classed as a system of confederated states. The criterion always is, whether the federal government enforce their own resolutions, in which case the aggregate body is sovereign: or whether those resolutions are only carried out by command issued and enforced at the will and by the power of the several governments, in which case there is merely a confederacy (more or less permanent) of supreme governments. For the purpose of national defense, doubtless the Swiss confederacy is very close and likely to be lasting. But its permanence seems rather to depend on the unanimity of the several governments in regard to that object than on any recognized power in the general government to coerce any single community. This instance, however, is one that illus-

trates the difficulty of drawing a precise line of demarcation between the two classes of objects.

240. From the various possible forms of supreme government, I proceed to the limits, real and imaginary, of sovereign power.

241. The essential difference of a positive law may be put thus: It is set directly or circuitously by a monarch or sovereign member to a member or members of the independent political society wherein that person or body is sovereign or supreme.

242. It follows that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of legal limitation. For a monarch or sovereign number bound by a legal duty would be subject to a higher or superior sovereign: contrary to the hypothesis involved in the definition of the terms monarch and sovereign number.

And every political society must have a sovereign (one or a number) freed from legal restraints. For if the society is subject to a person or body not freed from legal restraints, that person or body must be subject to another person or body, and so on in a series of human authorities, which must terminate, and must, therefore, terminate in a person or body who is freed from legal restraint, and is sovereign.

243. Monarchs and sovereign bodies have attempted to oblige themselves or to oblige the successors to their sovereign powers. But, in spite of such attempts, the position that sovereign power is incapable of legal limitations holds without exception.

The author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure. And if the law be not abrogated, the sovereign, for the time being, is not constrained to



observe it by any legal sanction. If he were, he would be in a state of subjection—*contra hypothesen*.

244. As regards the author of a law purporting to oblige the sovereign, such a law is merely a law by a metaphor, being only a principle assumed for the guidance of his own conduct. As regards his successors, it amounts at most to a rule of positive morality, the *quasi* sanction being the opinion of those who revere the memory of the author, or admire (rightly or wrongly) the principle of the so-called law. If that is a good principle, its violation by the sovereign may be not only a breach of positive morality, but a sin; it can not be a breach of legal duty.

245. For example: The sovereign Roman people solemnly voted or resolved that they would never pass or even take into consideration what I will venture to denominate a bill of pains and penalties. This solemn resolution or vote was passed with the forms of legislation, and was inserted in the Twelve Tables in the following imperative terms: *privilegia ne irroganto*. But although the resolution or vote was passed with the forms of legislation, it scarcely was a law in the proper acceptation of the term, and certainly was not a law simply or strictly so called. By that resolution or vote, the sovereign people adopted, and commended to their successors in the sovereignty, an ethical principle or maxim which (admirable as it is) could not legally bind the then present or any future sovereign. If the supreme government for the time being had afterwards passed a law or command infringing on the principle, the Roman tribunals could not have treated such a law or command as not legally binding.

246. Again: By the authors of the Union between England and Scotland an attempt was made to oblige the legislature, which, in consequence of that union, is

sovereign in both countries. It is declared in the Articles and Act of Union, that the preservation of the Church of England and of the Kirk of Scotland is a fundamental condition of the union. Now, so long as the bulk of either nation shall regard its established church with love and respect, the abolition of that church by the British Parliament would be an immoral act, for it would violate the positive morality which obtains with the bulk of the nation affected by the change. Supposing the abolition to conflict with the law of God, either as revealed or commended by general utility, the act would be a sin. But assuming, what will scarcely be denied, that the parliament for the time being is sovereign both in England and Scotland, no man, talking with a meaning, would call a parliamentary abolition of either or both of the churches an illegal act. The condition which affects to confer immortality upon those ecclesiastical institutions is not a positive law, but is counsel or advice offered by the authors of the union to future supreme legislatures.

247. By the topic lastly above discussed, I am led to consider the meanings of the epithet unconstitutional, as applied to conduct of a monarch, or to conduct of a sovereign number in its collegiate and sovereign capacity. This epithet as thus applied, and as opposed to the epithet illegal, is sometimes used with a more general and vague, and sometimes with a more special and definite meaning. I will begin with the former.

248. 1. In almost every independent political society, there are principles or maxims expressly adopted or tacitly accepted by the sovereign, and which the sovereign habitually observes. The cause of this observance commonly lies in the regard which is entertained for those principles or maxims by the bulk or most influential part of the community; or it may be that those principles or maxims have been adopted from a perception of

utility or from a belief of their conformity to the Divine will, or lastly they may have had an origin which affords no valid reason for their continuance. A law is said to be unconstitutional in the more general sense if it conflicts with these principles or maxims. For example: The *ex post facto* statutes which are styled Acts of Attainder, may be called unconstitutional, though they can not be called illegal. For they conflict with a principle of legislation which parliament has habitually observed, and which is regarded with approbation by the bulk of the British community.

In short, when an act of a sovereign is styled unconstitutional in that more general sense of the word, what is meant is, I believe, this: That the act is inconsistent with some given principle or maxim; that the given supreme government has expressly adopted the principle, or, at least, has habitually observed it, and that the principle is conformable to the general opinion and sentiments of the community which are shocked by the act in question: or that the principle is useful and the act pernicious; or that the principle is approved, and the act disliked by the speaker, without any reason of which he can give an account.

249. 2. The epithet unconstitutional as applied to conduct of a sovereign, and as used with the meaning which is more special and definite, imports that the conduct in question conflicts with constitutional law.

By the expression constitutional law, I here mean the positive morality, or the compound of positive morality and positive law, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside; and which, moreover, supposing the government in question an aristocracy or government of a number, determines the mode wherein the sovereign powers shall

be shared by the constituent members of the sovereign number or body.

Now, against a monarch, properly so called, or against a sovereign body in its collegiate and sovereign capacity, constitutional law, whether expressly adopted by the sovereign or his predecessors, or not, is positive morality merely; though, as I shall show hereafter, it may amount to positive law, or may be enforced by legal sanctions, against the members of the body considered severally. Consequently, although an act of the sovereign which violates constitutional law, may be styled with propriety unconstitutional, it is not an infringement of law simply and strictly so called, and can not be styled with propriety illegal.

250. For example: From the ministry of Cardinal Richelieu down to the great Revolution, the king for the time being was virtually sovereign in France. But, in the same country, and during the same period a traditional maxim cherished by the courts of justice, and rooted in the affections of the bulk of the people, determined the succession to the throne agreeably to the canon of inheritance which was named the Salic law. Now, in case an actual king, by a royal ordinance or law, had attempted to divert the throne to his only daughter and child, that royal ordinance or law might have been styled with perfect propriety an unconstitutional act. But illegal it could not have been called: for, inasmuch as the actual king was virtually sovereign, he was inevitably independent of legal obligation.

251. Again: An act of the British parliament vesting the sovereignty in the king, or vesting the sovereignty in the king and the upper or lower house, would essentially alter the structure of our present supreme government, and might therefore be styled with propriety an unconstitutional law. But to call it illegal were absurd.

for if the parliament for the time being be sovereign in the United Kingdom, it is the author, directly or circuitously of all our positive law, and exclusively sets us the measure of legal justice and injustice.\*

252. When I affirm that the power of a sovereign is incapable of legal limitation, I always mean by a "sovereign," a monarch properly so called, or a sovereign number in its collegiate and sovereign capacity. Considered collectively, or considered in its corporate character, a sovereign number is sovereign and independent; but considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts. Consequently, though the body is inevitably independent of legal or political duty, any of the individuals or aggregates whereof the body is composed may

\* It is affirmed by Hobbes, in his masterly treatises on government, that "no law can be unjust:" which proposition has been deemed by many an immoral or pernicious paradox. If we look at the scope of the treatise in which it occurs, or even at the passages by which it is immediately followed, we shall find that the proposition is neither pernicious nor paradoxical, but is merely a truism put in unguarded terms. His meaning is obviously this: that "no positive law is legally unjust." And the decried proposition, as thus understood, is indisputably true.

Just or unjust, justice or injustice, are terms of relative and varying import. When uttered with a determinate meaning, they are uttered with relation to a determinate law which the speaker assumes as a standard of comparison. This is hinted by Locke in the passage referred to at the end of my fifth lecture; and it is, indeed, so manifest, on a little sustained reflection, that it hardly needs the authority of that great and venerable name. If positive law be taken as the standard of comparison, it is manifest that a positive law can not be unjust. For that were equivalent to saying that it would be found unequal to itself used as a measure.

Though signifying conformity or non-conformity to any determinate law, the terms justice or injustice sometimes denote emphatically, conformity or non-conformity to the ultimate measure or test: namely, the law of God. This is the meaning annexed to justice, when law and justice are opposed: when a positive human rule is styled unjust. And when it is used with this meaning, justice is nearly equivalent to general utility. The only difference between them consists in this: that, as agreeing immediately with the law of God, a given and compared action is just; whilst, as agreeing immediately with the principle which is the index to the law of God, that given and compared action is generally useful. And hence it arises, that when we style an action just or unjust, we not uncommonly mean that it is generally useful or pernicious.

be legally bound by laws of which the body is the author. If a law set by the body to its members, even as members of the sovereign body, is clothed with a legal sanction, or the means of enforcing it judicially are provided by its author, it is properly a positive law. If it regards the constitution or structure of the given supreme government, a breach of the law, by the party to whom it is set, is not only unconstitutional, but is also illegal. The breach of the law is unconstitutional, inasmuch as the violated law regards the constitution of the state. The breach of the law is also illegal, inasmuch as the violated law may be enforced by judicial procedure.

253. In fact or practice, the members considered severally, but considered as members of the body, are commonly free, wholly or partially, from the legal or political restraints. For example: The king, as a limb of the parliament, is not responsible legally or can not commit a legal injury; and, as partaking in conduct of the assembly to which he immediately belongs a member of the house of lords, or a member of the house of commons, is not amenable to positive law. But though this freedom from legal restraints may be highly useful or expedient, it is not necessary or inevitable. Considered severally, the members of a sovereign body, be they individuals or be they aggregates of individuals, may clearly be legally amenable, even as members of the body, to laws which the body imposes.

254. And here I may remark, that if a member considered severally, but considered as a member of the body, be wholly or partially free from legal or political obligation, that legally irresponsible aggregate, or that legally irresponsible individual, is restrained or debarred in two ways from an unconstitutional exercise of its legally unlimited power. 1. Like the sovereign body of which it is a member, it is obliged or restrained morally: by opin-

ions and sentiments current in the given community. 2. If it affected to issue a command which it is not empowered to issue by its constitutional share in the sovereignty, that command would not be legally binding. Nay, the persons whom it commissioned to execute the unconstitutional command would probably be amenable to positive law if they tried to accomplish their mandate. For example: If the king or either of the houses, by way of proclamation or ordinance, affected to establish a law equivalent to an act of parliament, the pretended statute would not be legally binding, and disobedience to the pretended statute would therefore not be illegal. And although the king or the house would not be responsible legally for this supposed violation of constitutional law or morality, those whom the king or the house might order to enforce the statute, would be liable civilly or criminally, if they attempted to execute the order.

255. And this leads me to explain an apparent exception to my proposition that, considered severally, all the individuals and aggregates composing a sovereign number are subject to the supreme body of which they are component parts; and to show that the apparent exception is not a real one. In some of the mixed aristocracies which are styled limited monarchies, the so-called limited monarch is exempted or absolved completely from legal or political duty. For example: According to a maxim of the English law, the king is incapable of committing wrong: that is to say, he is not responsible legally for aught that he may please to do, or for any forbearance or omission.

But though he is absolved completely from legal or political duty, it can not be thence inferred that the king is sovereign or supreme, or that he is not in a state of subjection to the sovereign or supreme parliament of which he is a constituent member.

Of the numerous proofs of this negative conclusion, which it were easy to produce, the following will amply suffice.—1. Although he is free in fact from the fetters of positive law, he is not incapable of legal obligation. A law of the sovereign parliament, made with his own assent, might render himself and his successors legally responsible.—2. If he affected to transgress the limits which the constitution has set to his authority, disobedience on the part of the governed to his unconstitutional commands, would not be illegal; whilst the ministers or instruments of his unconstitutional commands, would be legally amenable, for their unconstitutional obedience, to laws of that sovereign body whereof he is merely a limb.—3. He habitually obeys the laws set by the sovereign body of which he is a constituent member. If he did not, he must speedily yield his office to a less refractory successor, or the British constitution must speedily expire. If he habitually broke the laws set by the sovereign body, the other members of the body would probably devise a remedy; though a prospective and definite remedy, fitted to meet the contingency, has not been provided by positive law, or even by constitutional morality. But in all these points the king differs from a sovereign properly so called. For—1. The sovereign is incapable of legal obligation. 2. The subjects are bound to obey its commands, and the ministers executing them are absolved by the command from legal liability to any person who may feel aggrieved by reason of such execution.—3. The sovereign can not habitually obey the commands of another determinate body.

256. But if sovereign or supreme power be incapable of legal limitation, or if every supreme government be legally absolute, wherein (it may be asked) doth political liberty consist, and how do the supreme governments which are commonly deemed free, differ from the



supreme governments which are commonly deemed despotic?

I answer, that political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects; and that, since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion.

257. Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than the political or legal restraints which are implied by the words *πόλις* and *civitas*. The final cause or purpose for which government ought to exist is the furtherance of the common weal to the greatest possible extent. And it must attain this purpose not less by imposing restraints than by conferring rights or liberties. As I shall show hereafter, political or civil liberties rarely exist apart from corresponding legal restraints. Where persons in a state of subjection are free from legal duties, their liberties (generally speaking) would be nearly useless to themselves, unless they were protected in the enjoyment of their liberties, by having legal rights (importing legal duties on their fellows) to those political liberties which are left them by the sovereign government.\* I am legally free, for example, to move from place to place, in so far as I can move

\* Political or civil liberties are left or granted by sovereigns, in two ways; namely, through permissions coupled with commands, or through simple permissions. If a subject possessed of a liberty be clothed with a legal right to it, the liberty was granted by the sovereign through a permission coupled with a command: a permission to the subject who is clothed with the legal right, and a command to the subject or subjects who are burdened with the relative duty. But a political or civil liberty left or granted to a subject, may be merely protected against his fellows by religious and moral obligations. In other words, the subject possessed of the political liberty may not be clothed with a legal right to it. And, on that supposition, the political or civil liberty was left or granted to the subject through a simple permission of the sovereign or state.

from place to place consistently with my legal obligations ; but this my political liberty would be but a sorry liberty, unless my fellow-subjects were restrained by a political duty from assaulting and imprisoning my body. Political liberty is therefore fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse.

258. From the nature of political or civil liberty, I turn to the supposed difference between free and despotic governments.

Every supreme government is free from legal restraints ; or (what is the same proposition dressed in a different phrase) every supreme government is legally despotic. The distinction, therefore, can not mean that some governments are freer from restraints than others ; nor can it mean that the subjects of the governments which are denominated free, are protected against their governments by positive law. Those who use the distinction employ the epithet free as importing praise, and the epithet despotic as importing blame. They can therefore hardly mean that the governments which are denominated free, leave or grant to their subjects more of political liberty than those which are styled despotic. For they who distinguish governments into free and despotic, suppose that the first are better than the second. But inasmuch as political liberty may be generally useful, it can not be assumed that one government is better than another, merely because the sum of the liberties which the former leaves to its subjects exceeds the sum of the liberties which are left to its subjects by the latter. The excess in the sum of the liberties which the former leaves to its subjects, may be purely mischievous. In consequence, for example, of that mischievous freedom, its subjects may be guarded inadequately against one another, or against attacks from external enemies

They who distinguish governments into free and despotic, probably mean by a "free government" a government of a popular or democratic form, and by their distinction wish to imply that such a government, being likely to regard the weal of the whole and not only of a narrow section of the community, is apt to leave or grant to its subjects not perhaps more political liberty than is left or granted them by a government of one or a few, but more of that political liberty which conduces to the common weal. They mean that, as leaving or granting to its subjects more of that useful liberty, a government of many may be styled free; whilst, as leaving or granting to its subjects less of that useful liberty, a government of one or a few may be styled not free, or may be styled despotic or absolute. In short, by the epithet free, as applied to governments of many, they mean that governments of many are comparatively good; and by the epithet despotic, as applied to monarchies or oligarchies, they mean that monarchies or oligarchies are comparatively bad.

The epithets free and despotic are rarely, I think, employed by the lovers of monarchy or oligarchy. If the lovers of monarchy or oligarchy did employ those epithets, they would probably apply the epithet free to governments of one or a few, and the epithet despotic to governments of many. For they think the former comparatively good, and the latter comparatively bad; or that monarchical or oligarchical governments are better adapted than popular, to attain the ultimate purpose for which governments ought to exist.

But with the respective merits or demerits of various forms of government, I have no direct concern. I have examined the current distinction between free and despotic governments, because it is expressed in terms which are extremely inappropriate and absurd, and which tend

to obscure the independence of political or legal obligation, that is common to sovereign governments of all forms or kinds.

259. That the power of a sovereign is incapable of legal limitation, has been doubted, and even denied. But the difficulty, like thousands of others, probably arose from a verbal ambiguity—from the circumstance that the foremost individual member of a so-called limited monarchy, whose power is not only capable of legal limitations, but is sometimes actually limited by positive law, is often improperly styled monarch or sovereign.

260. Whatever may be its origin, the error is remarkable. For the legal independence of monarchs in the proper acceptation of the term, and of sovereign bodies in their corporate and sovereign capacities, not only follows inevitably from the nature of sovereign power, but it is also asserted expressly by renowned political writers of opposite parties or sects: by celebrated advocates of the governments which are decked with the epithet free, as by celebrated advocates of the governments which are branded with the epithet despotic.

261. "If it be objected," says Sidney, "that I am a defender of arbitrary powers, I confess I can not comprehend how any society can be established or subsist without them. The difference between good and ill governments is not, that those of one sort have an arbitrary power which the others have not; for they all have it; but that in those which are well constituted, this power is so placed as it may be beneficial to the people."

262. "It appeareth plainly," says Hobbes, "to my understanding, that the sovereign power, whether placed in one man, as in a monarchy, or in one assembly of men, as in popular and aristocraticall commonwealths, is as great as men can be imagined to make it. And though of so unlimited a power men may fancy many evill con-

sequences, yet the consequence of the want of it, which is warre of every man against his neighbor, is much worse. The condition of man in this life shall never be without inconveniences: but there happeneth in no commonwealth any great inconvenience, but what proceeds from the subjects' disobedience. And whosoever, thinking sovereign power too great, will seek to make it lesse, must subject himselfe to a power which can limit it: that is to say, to a greater."—"One of the opinions (says the same writer) which are repugnant to the nature of a commonwealth, is this: that he who hath the sovereign power is subject to the civill lawes. It is true that all sovereigns are subject to the lawes of nature; because such lawes be Divine, and can not by any man, or by any commonwealth, be abrogated. But to the civill lawes, or to the lawes which the sovereign maketh, the sovereign is not subject: for if he were subject to the civill lawes, he were subject to himselfe; which were not subjection, but freedom. The opinion now in question, because it setteth the civill lawes above the sovereign, setteth also a judge above him, and a power to punish him: which is to make a new sovereign; and, again, for the same reason, a third to punish the second; and so continually without end, to the confusion and dissolution of the commonwealth."—"The difference (says the same writer) between the kinds or forms of commonwealth, consisteth not in a difference between their powers, but in a difference between their aptitudes to produce the peace and security of the people: which is their end." \*

\* By his modern censors, French, German, and even English, Hobbes main design in his various treatises on politics, is grossly and thoroughly mistaken. With a marvelous ignorance of the writings which they impudently presume to condemn, they style him the "apologist of tyranny"; meaning by that rant, that his main design is the defense of monarchical government. Now, though he prefers monarchical, to popular or oligarchical government, it is certain that his main design is the establishment of these propositions: 1. That sovereign power, whether it reside in one, or in many or a few, can not be limited by positive law. 2. That a present or

Before I discuss the origin of political government and society, I will briefly examine a topic allied to the liberty of sovereigns from political or legal restraints.

established government, be it a government of one, or a government of many or a few, can not be disobeyed by its subjects consistently with the common weal, or consistently with the law of God as known through utility or the Scriptures.—That his principal purpose is not the defense of monarchy, is sufficiently evinced by many passages of his *Leviathan*, and also of his treatise *De Cive*. To those who have really read, although in a cursory manner, these the most lucid and easy of profound and elaborate compositions, the current conception of their object and tendency is utterly laughable.

The capital errors in Hobbes' political treatises, are the following.—1. He inculcates too absolutely the religious obligation of obedience to present or established government. He makes not the requisite allowance for the anomalous and excepted cases wherein disobedience is counseled by that very principle of utility which indicates the duty of submission. Writing in a season of civil discord, or in apprehension of its approach, he naturally fixed his attention upon the glaring mischiefs of resistance, and scarcely adverted to the mischiefs which obedience occasionally engenders. And although his integrity was not less remarkable than the gigantic strength of his understanding, we may presume that his extreme timidity somewhat corrupted his judgment, and inclined him to insist unduly upon the evils of rebellion and strife.—2. Instead of directly deriving the existence of political government, from a perception by the bulk of the governed of its great and obvious expediency, he ascribes the origin of sovereignty, and of independent political society, to a fictitious agreement or covenant. He supposes, indeed, that the subjects are induced to make that agreement, by their perception of the expediency of government, and by their desire to escape from anarchy. But, placing his system immediately on that interposed figment, instead of resting it directly on the ultimate basis of utility, he often arrives at his conclusions in a sophistical and quibbling manner, though his conclusions are commonly such as the principle of utility will warrant.

If these two capital errors be kept in mind by the reader, Hobbes' extremely celebrated but extremely neglected treatises may be read to great advantage. I know of no other writer (except Jeremy Bentham) who has uttered so many truths, at once new and important, concerning the necessary structure of supreme political government, and the larger of the necessary distinctions implied by positive law. And he is signally gifted with the talent, peculiar to writers of genius, of inciting the mind of the student to active and original thought.

The authors of the antipathy with which he is commonly regarded, were the papistical clergy of the Roman Catholic Church, the high-church clergy of the Church of England, and the Presbyterian clergy of the true blue complexion. The pretensions which these persons advanced in favor of "the church" to an authority in "ecclesiastical matters," co ordinate with the authority of the secular government, were offensive to Hobbes, who supported with unflinching loyalty the temporal sovereign for the time being. He repelled those anarchical pretensions with a weight of reason, and an aptness and pungency of expression, which the aspiring and vindictive priests did bitterly feel and resent. Accordingly, they assailed him with

263. A sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity, has no legal rights (in the proper acceptation of the term) against its own subjects.

the poisoned weapons of malignity and cowardice. And so deep and enduring is the impression which they made upon the public mind, that "Hobbes the Atheist," or "Hobbes the apologist of tyranny," is still regarded with pious, or with republican horror, by all but the extremely few who have ventured to examine his writings.

Of positive atheism ; of mere scepticism concerning the existence of the Deity ; or of, what is more impious and mischievous than either, a religion imputing to the Deity human infirmities and vices ; there is not, I believe, in any of his writings, the shadow of a shade.

It is true that he prefers monarchical (though he intimates his preference rarely), to popular or oligarchical government. But of tyranny in the sense of monarchical misrule, he is no apologist, but may rank with the ablest and most zealous of its foes. Scarcely a single advocate of free or popular institutions, even in these latter and comparatively enlightened ages, perceives and inculcates so clearly and earnestly as he, the principal cause and preventive of tyrannous or bad government—namely, ignorance on the part of the multitude of sound political science.

In those departments of his treatises on politics, which are concerned with "the office (or duty) of the sovereign," Hobbes insists on the following propositions : That good and stable government is simply or nearly impossible, unless the fundamentals of political science be known by the bulk of the people : that the bulk of the people are as capable of receiving such science as the loftiest and proudest of their superiors in station, wealth, or learning : that to provide for the diffusion of such science throughout the bulk of the people, may be classed with the weightiest of the duties which the Deity lays upon the sovereign : that he is bound to hear their complaints, and even to seek their advice, in order that he may better understand the nature of their wants, and may better adapt his institutions to the advancement of the general good : that he is bound to render his laws as compendious and clear as possible, and also to publish their more important provisions through every possible channel : that if the bulk of his people know their duties imperfectly for want of the instruction which he is able and bound to impart, he is responsible religiously for all their breaches of the duties whereof he hath left them in ignorance.

In regard to the respective aptitudes of the several forms of government to accomplish the ultimate purpose for which government ought to exist, Hobbes' opinion closely resembles the doctrine, which a century later, that is, about the middle of the eighteenth century, was taught by the French philosophers who are styled emphatically the Economists.—In order, say the Economists, to the being of a good government, two things must pre-exist : 1. Knowledge by the bulk of the people, of the elements of political science (in the largest sense of the expression) : 2. A numerous body of citizens versed in political science, and not misled by interests conflicting with the common weal, who may shape the political opinions, and steer the political conduct, of the less profoundly informed though instructed and rational multitude.—And, for numerous and plausible reasons (which my limits compel me to omit), they affirm, that, in any society thus duly instructed, monarchical government would not only be the best, but would

264. Every legal right is the creature of a positive law; and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides. To every legal right, there are therefore three several parties: namely, a party bearing the right; a party burdened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government can not acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Consequently, if a sovereign government had legal rights against its own subjects, those rights would be the creatures of positive laws set to its own subjects by a third person or body, who must, therefore, be sovereign over them. The community would therefore be subject to two different sovereigns, which is contrary to the definition of sovereignty.\*

surely be chosen by that enlightened community, in preference to a government of a few, or even to a government of many.

The opinion taught by the Economists is rather, perhaps, defective, than positively erroneous. They leave an essential consideration uncanvassed and nearly untouched.—In a political community not duly instructed, is not popular government, with all its awkward complexness, less inconvenient than monarchy? And, unless the government be popular, can a political community not duly instructed, emerge from darkness to light? From the ignorance of political science, which is the principal cause of misrule, to the knowledge of political science, which is the best security against it? The Economists, indeed, occasionally admit, “*que dans l'état d'ignorance l'autorité est plus dangereuse dans les mains d'un seul, qu'elle ne l'est dans les mains de plusieurs.*” But with this consideration they rarely meddle. They commonly infer or assume, that, since in the state of ignorance the government is inevitably bad, the form of the government, during that state, is a matter of consummate indifference. Agreeing with them in most of their premises, I arrive at an inference extremely remote from theirs; namely, that in a community already enlightened, the form of the government were nearly a matter of indifference; but that where a community is still in the state of ignorance, the form of the government is a matter of the highest importance.

The political and economical system of Quesnai and the other Economists, is stated concisely and clearly by M. Mercier de la Rivière in his “*L'Ordre naturel et essentiel des Sociétés politiques.*”

\* It has often been affirmed that “right is might,” or that “might is



265. But so far as they are bound by the law of God to obey their temporal sovereign, a sovereign government has rights divine against its own subjects; rights

right." But this paradoxical proposition (a great favorite with shallow scoffers and buffoons) is either a flat truism affectedly and darkly expressed, or is thoroughly false and absurd.

If it mean that a party who possesses a right possesses the right through might or power of his own, the proposition is false and absurd. For a party who possesses a right necessarily possesses the right through the might or power of another: namely, the author of the law by which the right is conferred.

If it mean that right and might are one and the same thing, or are merely different names for one and the same object, the proposition in question is also false and absurd. My physical ability to move about, when my body is free from bonds, may be called might or power, but can not be called a right: though my ability to move about without hindrance from you, may doubtless be styled a right, with perfect precision and propriety, if I owe the ability to a law imposed upon you by another.

If it mean that every right is a creature of might or power, the proposition is merely a truism disguised in paradoxical language. For every right (divine, legal, or moral) rests on a relative duty. And, manifestly, that relative duty would not be a duty substantially, if the law which affects to impose it were not sustained by might.

I must here observe that "right" as a noun substantive has two meanings which ought to be distinguished carefully.

The noun substantive "a right" signifies that which jurists denominate "a faculty:" that which resides in a determinate party or parties, by virtue of a given law; and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. And the noun substantive "rights" is the plural of the noun substantive "a right." But the expression "right," when it is used as an adjective, is equivalent to the adjective "just:" as the adverb "rightly" is equivalent to the adverb "justly." And when used as the abstract name corresponding to the adjective "right," the noun substantive "right" is synonymous with the noun substantive "justice."

It is manifest that "right" as signifying "faculty," and "right" as signifying "justice," are widely different though not unconnected terms. But, nevertheless, the terms are confounded by many of the writers who attempt a definition of "right;" and their attempts to determine the meaning of that very perplexing expression are, therefore, sheer jargon. By many of the German writers on the sciences of law and morality (as by Kant, for example, in his "Metaphysical Principles of Jurisprudence"), "right" in the one sense is blended with "right" in the other. And through the disquisition on "right" or "rights," which occurs in his "Moral Philosophy," Paley obviously wavers between the dissimilar meanings.

The Italian "diritto," the French "droit," the German "recht," and the English "right," signify "right" as meaning "faculty," and also signify "justice:" though each of those several tongues has a name which is appropriate to "justice," and by which it is denoted without ambiguity.

In the Latin, Italian, French, and German there is a further ambiguity the name which signifies "right" as meaning "faculty," also signifies

which are conferred upon itself, through duties which are laid upon its subjects, by laws of a common superior. And so far as the members of its own community are severally constrained to obey it by the opinion of the community at large, it has also moral rights against its own subjects severally considered : rights which are conferred upon itself by the opinion of the community at large, and which answer to relative moral duties.

266. Consequently, when we say that a sovereign government, as against its own subjects, has or has not a right to do this or that, we necessarily mean by a right (supposing we speak exactly), a right divine or moral ; we necessarily mean (supposing we speak exactly), that it has or has not a right derived from a law of God, or derived from a law improperly so called which the general opinion of the community sets to its members severally.

But when we say that a government, as against its own subjects, has or has not a right to do this or that, we not uncommonly mean that we deem the act in question generally useful or pernicious. And this application of the word is not inexact if we mean that the act conforms to the Divine law as measured by the standard of utility ;

"law : " "jus," "diritto," "droit," or "recht," denoting indifferently either of the two objects. Accordingly, the "recht" which signifies "law," and the "recht" which signifies "right" as meaning "faculty," are confounded by German writers on the philosophy or rationale of law, and even by German expositors of particular systems of jurisprudence. They treat "recht" as a genus or kind, which they divide into two species or two sorts : namely, the "recht" equivalent to "law," and the "recht" equivalent to "right" as meaning "faculty." And some of them thicken the mess by a misapplication of terms borrowed from the Kantian philosophy. They divide "recht," as forming the genus or kind, into "recht in the objective sense," and "recht in the subjective sense ;" denoting by the former of those unapposite phrases, "law ;" and denoting by the latter, "right" as meaning "faculty." See note, p. 175, *post*.)

The confusion of "law" and "right," our own writers avoid : for the two disparate objects which the terms respectively signify, are commonly denoted in our own language by palpably distinct marks. But Hale and Blackstone are misled by this double meaning of the word *jus*, and translate *jus personarum et rerum*, "rights of persons and things : " which is mere jargon.

and that the government have therefore a right conferred on them by the Divine law to such an act.

267. To ignorance or neglect of these palpable truths, we may impute a pernicious jargon that was current in our own country on the eve of her horrible war with her North American children. By the great and small rabble in and out of parliament, it was said that the government sovereign in Britain was also sovereign in the colonies; and that, since it was sovereign in the colonies, it had a right to tax their inhabitants. It was objected by Mr. Burke to the project of taxing their inhabitants, that the project was inexpedient; pregnant with probable evil to the inhabitants of the colonies, and pregnant with probable evil to the inhabitants of the mother country.

268. But to that most rational objection, the sticklers for the scheme of taxation returned this asinine answer. They said that the British government had a right to tax the colonists; and that it ought not to be withheld by paltry considerations of expediency, from enforcing its sovereign right against its refractory subjects. Now, if they attached any determinate meaning to the word right, they must have meant that the British government was empowered by the law of God to tax its American subjects. But it had not a Divine right to tax its American subjects, unless the project of taxing them accorded with general utility; for every Divine right springs from the Divine law; and to the Divine law general utility is the index. To oppose the right to expediency, was, therefore, to oppose the right to the only test by which it was possible to determine the reality of the right itself.

269. A sovereign government of one, or of a number in its collegiate and sovereign capacity may appear in the character of defendant, or of demandant, before a tribunal of its own appointment, or deriving jurisdiction from itself. But we can not hence infer that the govern-

ment lies under legal duties, or has legal rights against its own subjects.

The claim of the plaintiff against the sovereign defendant can not be founded on a positive law. For then would the sovereign defendant be in a state of subjection—contrary to the definition of sovereignty. And the claim of the sovereign demandant can not be founded on a positive law; for such a law must have been set by a third party to a member or members of the society wherein the demandant is supreme; or in other words, the society is subject to another sovereign—that is to two sovereigns at once—contrary to the nature of sovereignty.

270. In fact, where the sovereign government appears in the character of defendant, it appears to a claim founded on a so-called law which it has set to itself. Where it appears in the character of demandant, it apparently founds its claim on a positive law of its own, and it pursues its claim judicially. The rights which are pursued against it before tribunals of its own, and also the rights which it pursues before tribunals of its own, are merely analogous to legal rights (in the proper acceptance of the term); they are quasi legal rights. The rights which are pursued against government before tribunals of its own, it may extinguish by its own authority. But it yields to those claims, when they are established judicially, as if they were truly founded on positive laws set to itself by a third and distinct party.—The rights which it pursues before tribunals of its own, are powers which it is free to exercise according to its own pleasure. But it prosecutes its claims through the medium of judicial procedure, as if they were truly founded on positive laws set to the parties defendant by a third person or body.

The foregoing explanation of the seeming legal rights

which are pursued against sovereign governments before tribunals of their own, tallies with the style of judicial procedure, which, in all or most nations, is observed in cases of the kind. The object of the plaintiff's claim is not demanded as of right, but is begged of the sovereign defendant as a grace or favor. In our own country, whether the claim be against the sovereign, or against the king individually, the form of proceeding is what is called a *Petition of Right*.<sup>\*</sup> In the latter case this mendicant

<sup>\*</sup> A *Petition of Right* according to the English practice may relate to a claim arising out of the act or omission of a department of Government, or to a claim against the Queen in a private capacity. In the former case redress is prayed from "Her Majesty," meaning (I think) the sovereign, as the ultimate author of the wrong, and morally responsible for it; and from the nature of the case, if in the power of the sovereign to give or withhold redress. The Act of Parliament (23 and 24 Vict. c. 34) which at present regulates the procedure, is in strict conformity with this view of the case. By sec. 14 of that Act, the Commissioners of the Treasury are required to pay the money and costs decreed "out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose." Where the petition relates to a claim of the latter kind, it also happens that the compulsion is merely a moral one. By the section last quoted it is in this case provided that "the amount to which the suppliant is entitled, shall be paid to him out of such funds or moneys as Her Majesty shall be graciously pleased to direct to be applied for that purpose." So runs the statute in accordance with the venerable tradition that the queen is personally free from legal obligation. This, as Austin shows, is a mere accident or peculiarity of our system of positive law. It is clear that if Parliament were to authorize legal execution against the queen's private property, however unconstitutional such an act might be considered, the queen would be bound personally by a legal obligation. It will appear from what is said above, that in the style of formal documents the words "Her Majesty," or the "Queen's most Excellent Majesty" are used in three entirely different senses:—1. As meaning the sovereign, e.g. when we speak of Her Majesty's Court of Queen's Bench. 2. As meaning the queen in a public capacity, but merely as a subject member of the parliament or of the body politic. 3. As meaning the queen as a private person.

The circumstance that suits brought in the Courts of India against the "Government of India" are in the form of ordinary actions is hardly an exception to the proposition that claims against the sovereign are presented in a mendicant form. The "Government of India," as the phrase is here used, is a political subordinate, whose relations with the Imperial Government are of a very complex description. In this country "the Secretary of State in Counsel of India" represents the pecuniary liabilities of the Government of India, and is constituted a legal person capable of being sued in an ordinary action. But, notwithstanding this, the Indian Government in the Political Department, which is under the absolute control of the Secretary of State, is not formally amenable to any legal liability.

style of presenting the claim is merely accidental. It arises from the mere accident to which I have adverted already : namely, that our own king, though not properly sovereign, is completely free in fact from legal duties.

271. Though a sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity, can not have legal rights against its own subjects, it may have a legal right against a subject or subjects of another sovereign government. A law imposed by the other government upon its own subjects may create a right in favor of the first government. The possession of a legal or political right against a subject or subjects of another sovereign government, consists,

The anomaly is, that there is no certain criterion to determine the class of matters which belong to the Political Department, and such determination is often practically left to the uncertain and capricious action of subordinate officials.

This may be the place to observe that in this country the immunity which the sovereign necessarily has, and which the king actually has, from legal obligation, is extended in form to the ministers or servants of the crown. Thus no civil action or mandamus will lie against the Lords of the Treasury, or the Postmaster-General, nor action against persons in their respective employ, as such public servants. (*The Queen v. Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387). And there are some wrongs for which there is no redress by Petition of Right. For that is only admissible where the quasi-obligation of the king or sovereign is equivalent to a debt, or arises in respect of the possession of a hereditament or chattel, or out of the breach of a contract made within the powers constitutionally committed to the Minister or Department of Government by whom the contract is made.

The remedy against a servant of the crown lies only in a complaint to the Head of the Department ; and if redress is got from him, the remedy would, I think, according to Austin's scheme, be a legal one, though not obtained by the ordinary forms of law. Again, if it is the act of the Head of the Department that is complained of, the attention of the Government as a body might be called to it by a motion or question in Parliament ; and if made a Cabinet question, and the Government as a body disapproved of the act, the offending minister might be compelled to vacate his office. This again would, according to Austin's definitions, be strictly a legal sanction. But if the Government should defend the act, or not think proper to interfere, the only means of redress which remain are those which are morally sanctioned ; namely, by the force of opinion—whether expressed in the censure of a definite body or bodies, such as Parliament or the constituencies convened at an election, or remaining in the indefinite form called public opinion ;—unless indeed, there is taken into account the exceptional and extraordinary remedy of a parliamentary impeachment, which would be, according to Austin's analysis, a legal remedy.—R. C.

therefore, with that independence which is one of the essentials of sovereignty.\*

272. Having determined the general notion of sovereignty, and illustrated my definition by considering the possible forms of supreme government and the limits of supreme political power, I now proceed to the origin or causes of the habitual or permanent obedience, which, in every society political and independent, is rendered by the bulk of the community to the monarch or sovereign number. In other words, I proceed to the origin or causes of political government and society.

273. The proper purpose or end of a sovereign political government, or the purpose or end for which it ought to exist, is the greatest possible advancement of human happiness. To accomplish that end effectively, it commonly must labor directly and particularly to advance as far as is possible the weal of its own community. For the good of the universal society formed by mankind is the aggregate good of the particular societies into which mankind is divided: just as the happiness of any of those societies is the aggregate happiness of its single or individual members. And if every government consulted the weal of its own subjects, the probable tendency would clearly be to promote the general happiness of mankind. And it were easy to show, that the general and particular ends never or rarely conflict.

\* In our own courts of law and equity it is held as undoubted, that foreign sovereigns, whether in name monarchs or republics, can sue in their sovereign capacity; and they are recognized as plaintiffs in our courts of law and equity by the same name and style under which they are recognized by our own sovereign (that is, nominally, by Her Majesty) in diplomatic intercourse.—(Case of the King of Spain, judgment by Lord Lyndhurst in the House of Lords. 2 Bligh Reports. New series, p. 31. Case of the United States of America *v.* Wagner, Court of Chancery, May 29, June 11, 17, 1867. L. R. 2 Ch. 582 Judgment by Lord Chancellor Chelmsford and Lord Justices Turner and Cairns.)

As to the possibility of a sovereign being subject to another sovereign, to certain limited effects, see concluding explanations in this chapter—R. C.

An enlightened regard for the common happiness of nations, implies an enlightened patriotism; whilst the stupid and atrocious patriotism which looks exclusively to country, and would further the interests of country at the cost of all other communities, grossly misapprehends and frequently crosses the interests that are the object of its narrow concern. But the topic which I now have suggested, belongs to the province of ethics, rather than the province of jurisprudence.\*

\* The proper purpose or end of a sovereign political government is conceived inadequately or obscurely by most or many of the writers on political government and society.

Speaking generally and vaguely, it may be said that the proper end of government is to co-operate in advancing the happiness of mankind. This is the same as to say that the particular and determinate end is (in an enlightened manner, and therefore with due regard to the happiness of other communities) to advance as far as possible the weal of its own community. The writers in question mistake for the proper absolute end one or a few of the instrumental ends through which a government must accomplish that absolute end.

For example: it is said by many of the speculators on political government and society, that "the end of every government is to institute and protect property." And here I must remark, by the by, that the propounders of this absurdity give to the term "property" an extremely large and not very definite signification. They mean generally by the term "property," legal rights, or legal faculties: and they mean not particularly by the term "property," the legal rights, or legal faculties, which are denominated strictly "rights of property or dominion." Now the proper paramount purpose of a sovereign political government, is not the creation and protection of legal rights or faculties, or (in the terms of the proposition) the institution and protection of property. If that were the paramount purpose, the end might be the advancement of misery, rather than the advancement of happiness; since many of the legal rights which governments have created and protected (as the rights of masters, for example, to and against slaves), are generally pernicious, rather than generally useful. To advance as far as is possible the common happiness or weal, a government must confer on its subjects beneficent legal rights, or such legal rights as general utility commends; and, having conferred on its subjects beneficent legal rights, must preserve those rights from infringement, by enforcing the corresponding sanctions. But the institution and protection of beneficent legal rights, or of the kinds of property that are commended by general utility, is merely a subordinate and instrumental end through which the government must accomplish its paramount or absolute purpose.—As affecting to determine the absolute end for which a sovereign government ought to exist, the proposition in question is, therefore, false. And, considered as a definition of the means through which the sovereign government must reach that absolute end, the proposition in question is defective. If the government would duly accomplish its proper paramount purpose, it must not confine its care to the creation of legal rights, and to the creation



274. From the proper purpose or end of a sovereign political government we may readily infer the causes of that habitual obedience which would be paid to the sovereign by the bulk of an enlightened society. If they thought the government perfect, or that the government accomplished perfectly its proper purpose or end, this their conviction or opinion would be their motive to obey. If they deemed the government faulty, a fear that the evil of resistance might surpass the evil of obedience, would be their inducement to submit; for they would not persist in their obedience to a government which they deemed imperfect, if they thought that a better government might probably be got by resistance, and that the probable good of the change outweighed its probable mischief.

and enforcement of the answering relative duties. There are absolute legal duties, or legal duties without corresponding rights, that are not a whit less requisite to the advancement of the general good than legal rights themselves with the relative duties which they imply. Nor would a government accomplish thoroughly its proper paramount purpose, if it merely conferred and protected the requisite rights, and imposed and enforced the requisite absolute duties: Though a good legislation with a good administration of justice, or good laws well administered, are doubtless the chief of the means through which it must attain to that end, or (in Bacon's figurative language) are the nerves of the common weal.

The prevalent mistake which I now have stated and exemplified, is committed by certain of the writers on the science of political economy, whenever they meddle incidentally with the connected science of legislation. Whenever they step from their own into the adjoining province, they make expressly, or they make tacitly and unconsciously, the following assumption: that the proper absolute end of a sovereign political government is to further as far as is possible the growth of the national wealth. If they think that a political institution fosters, or that a political institution damps production and accumulation, they forthwith pronounce that the institution is good or bad. They forget that the wealth of the community is not the weal of the community, though wealth is one of the means requisite to the attainment of happiness. They forget that a political institution may further the weal of the community, though it checks the growth of its wealth; and that a political institution which quickens the growth of its wealth, may hinder the advancement of its weal.\*

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\* This it will be remembered was written long before the appearance of J. S. Mill's "Political Economy." That author and Professor Fawcett must be mentioned as writers by whom the distinction here referred to is never ignored or forgotten.—R. C.

275. Since every actual society is inadequately instructed or enlightened, the habitual obedience to its government which is rendered by the bulk of the community, is partly the consequence of custom—the habit already acquired. Or it is partly the consequence of prejudices; meaning by “prejudices,” opinions and sentiments which have no foundation whatever in the principle of general utility. If, for example, the government is monarchical, they partly pay that obedience to that present or established government, because they are fond of monarchy inasmuch as it is monarchy, or because they are fond of the race from which the monarch has descended. Or if, for example, the government is popular, they partly pay that obedience to that present or established government, because they are fond of democracy inasmuch as it is democracy, or because the word “republic” captivates their fancies and affections.

276. But though that habitual obedience is partly the consequence of custom, or of prejudices, it partly arises from a reason based upon the principle of utility. If for specific reasons, they are attached to the established government, their perception of the utility of government concurs with their attachment, and assists in confirming the habit. If they dislike the established government, their dislike is controlled by the same cause. The perception, by the bulk of the community, of the utility of political government, or a preference by the bulk of the community of any government to anarchy, is the only cause of the habitual obedience in question, which is common to nearly all societies; and therefore the only cause which the present general disquisition can properly embrace. The causes of the obedience in question which are peculiar to particular societies belong to the province of statistics, or the province of particular history.

277. The only general cause of the permanence of po-

litical governments, and the only general cause of the origin of political governments, are exactly or nearly alike. Though every government has arisen in part from specific or particular causes, almost every government must have arisen in part from the following general cause, namely, that the bulk of the natural society from which the political was formed, were desirous of escaping to a state of government, from a state of nature or anarchy. If they liked specially the government to which they submitted, their general perception of the utility of government concurred with their special inclination. If they disliked the government to which they submitted, their general perception of the utility of government controlled and mastered their repugnance.

278. According to a current expression, the permanence and origin of every government are owing to the people's consent; that is to say, every government continues through the consent of the people, or the bulk of the political community; and every government arises through the consent of the people, or the bulk of the natural society from which the political is formed. According to the same opinion dressed in a different phrase, the power of the sovereign flows from the people, or the people is the fountain of sovereign power.

279. That a government continues through the people's consent is true in one sense. The permanence of every government depends on the habitual obedience which it receives from the bulk of the community. But all obedience is voluntary or free, or every party who obeys consents to obey. In other words, every party who obeys wills the obedience which he renders, or is determined to render it by some motive or another. That acquiescence which is purely involuntary, or which is purely the consequence of physical compulsion or restraint, is not obedience or submission. As correctly or

truly apprehended, the position "that every government continues through the people's consent" merely amounts to this; that, in every society political and independent, the people are determined by motives of some description or another, to obey their government habitually; and that, if the bulk of the community ceased to obey it habitually, the government would cease to exist.

280. But the position in question, as it is often understood, is taken with one or another of the two following meanings:—1st. That the bulk of every community without inconvenience to themselves, can abolish the established government, and yet consent to its continuance or pay it habitual obedience; which is the same as to say, That the bulk of every community approve of the established government, and consent to its continuance, or pay it habitual obedience, by reason of that their approbation. As thus understood, the position is ridiculously false; the habitual obedience of the people, in most or many communities, arising wholly or partly from their fear of the propable evils which they might suffer by resistance. Or 2ndly, That if the bulk of a community dislike the established government, the government ought not to continue. If every actual society were adequately instructed or enlightened, the position, as thus understood, would approach nearly to the truth. For the dislike of an enlightened people towards their established government, would beget a violent presumption that the government was faulty or imperfect. But, in every actual society, the government has neglected to instruct the people in sound political science; or pains have been taken by the government, or the classes that influence the government, to exclude the bulk of the community from sound political science, and to perpetuate or prolong the prejudices which weaken and distort their undertakings. Every society, therefore, is inadequately

instructed or enlightened; and, in most or many societies the love or hate of the people towards their established government would scarcely beget a presumption that the government was good or bad. An ignorant people may love their established government, though by cherishing pernicious institutions and fostering mischievous prejudices, it positively prevents the progress in useful knowledge and in happiness, which its subjects would make spontaneously if it simply were careless of their good. And so may an ignorant people hate their established government, though it labors strenuously and wisely to further the general weal. The dislike of the French people to the ministry of the godlike Turgot, amply evinces the melancholy truth. They stupidly thwarted the measures of their warmest and wisest friend, and made common cause with his and their enemies—with the rabble of nobles and priests who strove to uphold misrule and to crush the reforming ministry with a load of calumny and ridicule.

**281.** That the permanence of every government is owing to the people's consent, and that the origin of every government is owing to the people's consent, are two positions so closely allied, that what I have said of the former will nearly apply to the latter.

**282.** Every government has arisen through the consent of the people, in this sense, that their submission is a consequence of motives, or they will the submission which they render. But a special approbation of the government to which they freely submit may not be their motive to submission. Although they submit to it freely, the government perhaps is forced upon them by a fear of the evils which would follow a refusal to submit. Through a fear of those evils (and, probably, by a general perception of the utility of political govern-

ment), they freely submit to a government from which they are specially averse.

283. The expression "that every government arises through the people's consent," is often uttered with the following meaning: that the bulk of a natural society about to become a political, or the inchoate subjects of an inchoate political government, promise, expressly or tacitly, to obey the future sovereign. The expression as uttered with this meaning confounds consent and promise, and therefore is grossly incorrect. The proposition so intended to be conveyed is, however, noteworthy as being involved by an hypothesis which I proceed to examine.

284. In every political society the subjects are under duties to the sovereign one or body, partly religious, partly legal, and partly moral. The sovereign government is under duties to the subjects, religious and moral, but not legal. This can easily be made to appear by an easy application of the principles reiterated in the preceding lectures.

285. It follows that the duties of the subjects towards the sovereign government, with the duties of the sovereign government towards the subjects, originate respectively in three several sources: namely, the Divine law (as indicated by the principle of utility), positive law, and positive morality. And, to my understanding, it seems that we account sufficiently for the origin of those obligations, when we simply refer them to those their obvious fountains, and that an ampler solution of their origin is not in the least requisite, and, indeed, is impossible. But there are many writers on political government and society, who are not content to account for their origin by simply referring them to those their manifest sources, and who accordingly resort to the hypothesis of the original covenant or contract, or the fundamantal civil pact.

286. By the writers who resort to it, this renowned and not exploded hypothesis is imagined and rendered variously. But its effect as imagined and rendered by most of those writers, may be stated generally thus:

287. To the formation of every society political and independent—of every πόλις, or civitas—all its future members then in being are joint or concurring parties: parties to an agreement in which the body politic then originates, and on which as a basis it afterwards rests. As being the necessary source of the independent political society, this agreement of all is styled the original covenant; as being the necessary basis whereon the civitas afterwards rests, it is styled *pactum civile fundamentale*.—In the process of making this covenant or pact there are three several stages; which may be described in the following manner. 1. The future members of the community about to be created jointly resolve to unite themselves into an independent political society; signifying and determining withal the paramount purpose of their union, or even of some its subordinate or instrumental ends. And here I must briefly remark, that the paramount purpose so determined is the paramount purpose for which a society political and independent ought to be founded and perpetuated. By the writers who resort to the hypothesis, this paramount purpose or absolute end is conceived differently. To writers who admit the system which I style the theory of utility, this purpose or end is the advancement of human happiness. To a multitude of writers who have flourished and flourish in Germany, the following is the truly magnificent though somewhat mysterious object of political government and society; namely, the extension over the earth, or over its human inhabitants, of the empire of right or justice. It would seem that this right or justice, like the good Ulpian's justice, is absolute, eternal, and

immutable. It is not the right or justice which is merely a creature of the law of God, but something self-evident to which his law conforms or should conform. I can not understand it, and will not attempt to explain it. Merely guessing at what it may be, I take it for the right or justice mentioned in a preceding note: I take it for general utility darkly conceived and expressed. 2. Having resolved to unite themselves into an independent political society, all the members of the inchoate community jointly determine the constitution of its sovereign political government; the member or members in whom the sovereignty shall reside; and if there are to be more than one, they jointly determine the mode wherein the sovereign number shall share the sovereign powers. 3. The process of forming the independent political society is completed by promises given and accepted; namely, by a promise of the inchoate sovereign to the inchoate subjects, by promises of the latter to the former, and by a promise of each of the latter to all and each of the rest. The purport of these promises is the following.—The sovereign promises generally to govern to the paramount end of the independent political society, and especially to govern to the subordinate ends (if any) signified by the resolution to form the society. The subjects promise to render to the sovereign such obedience as shall consist with that paramount purpose and those subordinate purposes. The resolution of the members to unite themselves into an independent political society, is styled *pactum unionis*. Their determination of the constitution or structure of the sovereign political government, is styled *pactum constitutionis* or *pactum ordinationis*. The promise of the sovereign to the subjects, with the promises of the subjects to the sovereign and to one another, are styled *pactum subjectionis*; for, through these promises the relation of subjection and



sovereignty arises between the parties. But of the three so-called pacts, the last only is properly a convention. Through this convention, which is styled the original convention, or fundamental pact, the sovereign is bound (at least religiously) to govern as is mentioned above; and the subjects are bound (religiously) to render to the sovereign for the time being, the obedience above described. And the binding virtue of this fundamental pact is not confined to the founders of the independent political society; but extends to their respective successors. Through the promise made by the original sovereign, following sovereigns are bound (religiously) to govern as is mentioned above. Through the promises made by the original subjects, following subjects are bound (religiously) to render to the sovereign for the time being, the obedience above described.—In every society political and independent, the duties (that is to say, religious duties) of the sovereign towards the subjects, and of the subjects towards the sovereign, arise from a pact or original covenant such as I have above delineated. Unless we suppose such an agreement, we can not account adequately for those their respective obligations.

288. Such, I believe, is the general purport of the hypothesis, as it is imagined and rendered by most of the writers who resort to it.

289. But, as I have remarked above, the writers who resort to the hypothesis imagine and render it variously. According to some, The original subjects, covenanting for themselves and their followers, promise obedience to the original and following sovereigns; but the original sovereign is not a promising party to the fundamental civil pact. And by the different writers who render the hypothesis thus, the purport of the subjects' promises is variously imagined. For example, some suppose that the obedience promised by the subjects is the qualified

or conditional obedience described above; whilst others suppose that the obedience promised by the subjects is an obedience passive or unlimited. But though the writers who resort to the hypothesis imagine and render it variously, they concur in this: That the religious duties of the subjects towards the sovereign are creatures of the original covenant. And the writers who fancy that the original sovereign was a promising party to the pact, also concur in this: That the religious duties of the sovereign towards the subjects are engendered by the same agreement.

290. Having stated the purport of the hypothesis, I will now suggest shortly a few of the conclusive objections to which it is open.

291. 1. To account for the respective duties of subjects towards their sovereign government, and of the sovereign government towards its subjects, is the scope of every writer who supposes an original covenant. But we sufficiently account for the origin of those respective obligations, when we refer them simply (or without the supposition of an original covenant) to their apparent and obvious fountains; namely, the law of God, positive law, and positive morality. Besides, if the formation of an independent political society were really preceded by a fundamental civil pact, scarce any of the duties lying thereafter on the subjects, or on the sovereign, would be engendered or influenced by that foregoing convention. The hypothesis, therefore, of an original covenant, is needless, and is worse than needless. It affects to assign the cause of certain phenomena, namely, the respective duties of subjects and sovereign; and the cause which it assigns is not only superfluous, but also inefficient.

292. That an original covenant, although it really preceded the formation of an independent political society, would hardly oblige (legally, religiously, or mor-

ally) the original subjects or sovereigns or their respective successors, will appear from the following analysis.

293. Every convention which obliges legally (or every contract properly so called) derives its legal efficacy from a positive law. Speaking exactly, it is not the convention that obliges legally, or that engenders the legal duty; but the law annexes the duty to the convention; or determines that duties of the given class shall follow conventions of the given description. Consequently, if the sovereign government were bound legally by the fundamental civil pact, the legal duty lying on the government would be the creature of a positive law annexing the duty to the pact. And such a law must have been set by a sovereign government other than the sovereign government bound by it. Consequently, the latter would be in a state of subjection—contrary to the hypothesis. The subjects, however, might be legally bound to keep the original covenant. But this legal duty would properly proceed from the law set by their own sovereign, and not from the covenant itself.

294. Again, if the sovereign or subjects were bound religiously by the fundamental civil pact, the religious duty lying on the sovereign, or the religious duty lying on the subjects, would properly proceed from the Divine law, and not from the pact itself.

295. The proper absolute end of an independent political society, and the nature of the index to the law of God, are conceived differently by different men. But whatever be the absolute end of an independent political society, and whatever be the nature of the index to the law of God the sovereign would, without an original covenant, be bound religiously to govern to that absolute end; and the subjects would, without an original covenant, be bound religiously to render to the sovereign the obedience which the accomplishment of the end might

require. The original covenant, if consistent with that absolute end, would be superfluous and therefore inoperative. If the original covenant conflicted with that absolute end, it would also conflict with the law which is the source of religious obligations, and would not oblige religiously the sovereign government or its subjects.

296. And though the original sovereign or the original subjects might have been bound religiously by the original covenant, why or how should it bind religiously the succeeding sovereign or subjects? Duties to the subjects for the time being, would be laid by the law of God on all the following sovereigns; and duties to the sovereign for the time being, would be laid by the law of God on all the following subjects; but why should those obligations be laid on those following parties, through the fundamental pact?—through or in consequence of a pact made without their authority, and even without their knowledge? Legal obligations often lie upon parties (as, for example, upon heirs or administrators), through or in consequence of promises made by other parties whose faculties or means of fulfilling obligations devolve or descend to them by virtue of positive law. And I perceive readily the expediency of these provisions of positive law. But I am unable to perceive, why or how a promise of the original sovereign or subjects should bind religiously the following sovereigns or subjects: though I see that the cases of legal obligation to which I now have adverted, probably suggested the groundless conceit to those who devised the hypothesis of a fundamental civil pact.

297. If, again, the sovereign were bound morally to keep the original covenant, the sovereign would be bound by opinions current amongst the subjects, to govern to the absolute end at which its authors had

aimed. And if the subjects were bound morally to keep the original covenant, they would be bound severally by opinions of the community at large, to render to the sovereign the obedience which the accomplishment of the end might require. But the moral obligations thus incumbent on the sovereign, with the moral obligations thus incumbent on the subjects, would not be imposed by the positive morality of the community, through or in consequence of the pact.

298. To take the case most favorable to the hypothesis that these obligations arise from such a pact, let us assume that the fancied original covenant was conceived and constructed by its authors, with some particularity and precision: that, having determined the absolute end of their union, it specified some of the ends positive or negative, or some of the means or modes positive or negative, through which the sovereign government should rule to that absolute end. The founders, for example, of the independent political society (like the Roman people who adopted the Twelve Tables), might have adverted specially to the monstrous and palpable mischiefs of *ex post facto* legislation. The fancied covenant might have determined specially, that the sovereign government about to be formed should forbear from legislation of the kind; and the obedience promised by the subjects might have been promised with a corresponding reservation.

299. Now the bulk or generality of the subjects, in an independent political community, might think alike, concerning the absolute end to which their sovereign government ought to rule: and yet their uniform opinions concerning that absolute end might bind or control their sovereign very imperfectly. For notwithstanding such uniformity of sentiments they might think so variously in regard to the subordinate ends by which that

paramount end was to be compassed that they would hardly oppose to the government, in any particular case, a uniform, simultaneous, and effectual resistance.—But if the mass of the subjects thought alike or uniformly concerning more or fewer of the proper subordinate ends of government, those uniform opinions would probably exercise a potent influence over the sovereign. Speaking generally the proper subordinate ends of a sovereign political government may be imagined in forms, and stated in expressions, which are neither extremely abstract, nor extremely vague. And, if they are clearly conceived and definitely expressed, the government could hardly venture to deviate from any of them without incurring discontent and possible resistance.

300. The extent to which a government is bound by the opinions of its subjects and the efficacy of the moral duties which their opinions impose upon it depend, therefore, mainly on the two following causes: First, the number of its subordinate ends concerning which the mass of its subjects think alike or uniformly: secondly, the degree of clearness and precision with which they conceive the ends in respect whereof their opinions thus coincide.

301. It follows from what I have premised, that, if an original covenant had determined clearly and precisely some of the subordinate ends of government, and those ends were favored by the opinions of the mass of the subjects for the time being, the sovereign would be bound effectually by the positive morality of the community, to rule to the subordinate ends which the covenant had thus specified. And here (it might be argued) the sovereign would be bound morally to rule to those same ends, through or in consequence of the fundamental pact. For (it might be said) the efficacy of the opinions binding the sovereign government would mainly arise from the clear-

ness and precision with which those same ends were conceived by the mass of the subjects ; and this again from the clearness and precision with which those same ends had been specified by the original covenant. It will, however, appear, on a moment's reflection, that the opinions of the subject founders of the independent political society were the cause rather than the effect of the covenant. And, granting that the clearness with which they were specified by the covenant would impart an answering clearness to the conceptions of the subjects their successors, that effect would not be wrought by the covenant as being a covenant or pact ; but as being a luminous statement of those same subordinate ends. And any similar statement which might circulate widely (as a similar statement, for example, by a popular and respected writer), would work a similar effect.

302. The following (I think) is the only, or nearly the only case, wherein an original covenant, as being a covenant or pact, might generate or influence any of the duties lying on the sovereign or subjects.

303. It might be believed by the bulk of the subjects, that their sovereign government was bound religiously to govern to what they esteemed the absolute end of government, rather because it had promised to govern to that absolute end, than by reason of the intrinsic worth belonging to the end itself. Now, if the mass of the subjects potently believed this, the duties of the government towards its subjects, which the positive morality of the community imposed upon it, would exist wholly or in part, because the original covenant had preceded or accompanied the institution of the independent political society. For if it departed from any of the ends determined by the original covenant, the mass of its subjects would be moved to anger (and perhaps to eventual rebellion), by its breach of its promise, real or supposed,

rather than by that misrule of which they esteemed it guilty. In this single case, the moral duties of the sovereign towards the subjects would be influenced by an original covenant real or supposed. But it will appear from the following analysis, that, where it might engender or influence any of those moral duties, that preceding convention would probably be pernicious.

304. An original covenant would be simply useless, if it merely determined the absolute end of the sovereign political government; if it merely determined that the absolute end of the government was the greatest possible advancement of the common happiness or weal. For though the covenant might give uniformity to the opinions of the mass of the subjects in regard to that paramount purpose expressed in general terms, that uniformity would, as I have shown already, hardly influence the conduct of their sovereign political government.

305. But the covenant might specify some of the means through which the government should rule to its absolute end—the common weal. And as specially determining any of those means, or any of the subordinate ends to which the government should rule, the original covenant would be simply useless, or would be positively pernicious.

If the covenant of the founders of the community did not affect the opinions of its succeeding members, it would be simply useless.

If the covenant of the founders of the community did affect the opinions of its succeeding members, it probably would be pernicious. The community would impute to the subordinate ends specified by the original covenant, a worth extrinsic and arbitrary or independent of their intrinsic merits. They would respect the specified ends not merely because they believed them to



be useful, but because the venerable founders of the independent political society had determined (by the venerable original covenant) that those same ends were some of the ends or means through which the weal of the community might be furthered by its sovereign government. Now the venerable age wherein the community was founded, would probably be less enlightened (notwithstanding its claims to veneration) than any of the ensuing and degenerate ages through which the community might endure. Consequently the opinions held in an age comparatively ignorant, concerning the subordinate ends to which the government should rule, would influence, more or less, through the medium of the covenant, the opinions held, concerning those ends, in ages comparatively well-informed. Let us suppose, for example, that the formation of the British community was preceded by a fundamental pact. Let us suppose (a "most unforced" supposition) that the ignorant founders of the community deemed foreign commerce hurtful to domestic industry. Let us suppose, moreover, that the government about to be formed promised for itself and its successors, to protect the industry of its own society, by forbidding and preventing the importation of foreign manufactures. Now if the fundamental pact made by our worthy ancestors were devoutly revered by many of ourselves, it would hinder the diffusion of sound economical doctrines through the present community: and it would prevent the existing sovereign government from legislating wisely and usefully in regard to our commercial intercourse with other independent nations. Nay, the lovers of darkness assuredly would affirm, and probably would potently believe, that the government was incompetent to withdraw the restrictions which the laws of preceding governments have laid on our foreign commerce: that being, as it were, a privy of the first or orig-

inal government, it was estopped by the solemn promise which that government had given.

306. Promises or oaths on the part of the original sovereign, or of succeeding sovereigns, are not the efficient securities, moral or religious, for beneficent government or rule. The best of moral securities, or the best of the securities yielded by positive morality, would arise from a wide diffusion, through the mass of the subjects, of the soundest political science which the light of the age could afford. The best of religious securities would arise from worthy opinions, held by rulers and subjects, concerning the wishes and purposes of the Good and Wise Monarch, and concerning the nature of the duties which he lays upon earthly sovereigns.

307. 2. It will appear from the following strictures, that the hypothesis of the fundamental pact is not only a fiction, but is a fiction approaching to an impossibility: that the institution of a *πόλις*, or civitas, or the formation of a society political and independent, was never preceded or accompanied, and could hardly be preceded or accompanied by an original covenant properly so called, or by aught resembling the idea of a proper original covenant.

308. Every convention properly so called consists of a promise or mutual promises proffered and accepted. Where one only of the agreeing parties gives a promise, the convention is said to be unilateral. Wherever mutual promises are proffered and accepted, there are, in strictness, two or more conventions: for the promise proffered by each, and accepted by the other of the agreeing parties, is of itself an agreement. But where the performance of either of the promises is made to depend on the performance of the other, the several conventions are commonly deemed one convention, and the convention is then said to be bilateral.

309. The main essentials of a convention are these: First, a signification by the promising party, of his intention to do the acts, or to observe the forbearances, which he promises to do or observe: secondly, a signification by the promisee, that he expects the promising party will fulfill the proffered promise. And that these are of the very essence of a proper convention or agreement, will appear on a moment's reflection.

310. The conventions enforced by positive law or morality are enforced legally or morally for various reasons, of which the following is always one.—Sanctions apart, a convention tends to raise in the mind of the promisee an expectation that its object will be accomplished: and to the expectation so raised he naturally shapes his conduct. Now, as much of the business of human life turns or moves upon conventions, frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes, and of thwarted projects and labors. To prevent such disappointments is a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements. But the promisee would not entertain the expectation, unless the corresponding intention were signified by the promising party: and, unless the existence of the expectation were signified by the promisee, the promising party would not be apprised of its existence, although the proffered promise had actually raised it. Without the signification of the intention, there would be no promise properly so called: without the signification of the expectation, there would be no sufficient reason for enforcing the genuine promise which really may have been proffered. A promise proffered but not accepted is called in the technical language of the Roman jurists, a *pollicitation*.\*

\* The incidental statement, in the text, of the essentials of a convention  
1.—13

311. It follows that an original covenant properly so called, or aught resembling it, could hardly precede the formation of an independent political society.

312. According to the hypothesis of the original covenant, in so far as it regards the promise of the original sovereign, the sovereign promises to govern to the absolute end of the union (and, perhaps, to more or fewer of its subordinate or instrumental ends). And the promise is proffered to, and is accepted by, all the original subjects. According to the hypothesis of the original covenant, in so far as it regards the promise of the original subjects, they promise to render to the sovereign such a qualified obedience as shall consist with the given ends. And the promise of the subjects passes from all the subjects; from all and each of the subjects to the monarch or sovereign body, or from each of the subjects to all and each of the rest.

313. Now it appears from the foregoing statement of the main essentials of a convention, that the promise of the sovereign to the subjects would not be a covenant properly, unless the subjects accepted it. But the subjects could hardly accept it, unless they apprehended its object. Otherwise, the promise could hardly raise in their minds any determinate expectation; still less could they signify such expectation. Now the ignorant and weaker portion of the inchoate community (the portion, for example, which was not adult) could hardly apprehend the object of the sovereign's promise, whether general or special. We know that the great majority, in any actual community, have no determinate notions concerning the absolute end to which their sovereign government

or pact, is sufficient for the limited purpose to which I have there placed it. A good exposition of the rationale of contract or convention would involve a searching analysis of the following intricate expressions:—promise, solicitation, convention, agreement, or pact, contract, quasi-contract, some of which will be further adverted to in the sequel.

ought to rule; nor any determinate notions concerning the ends or means through which it should aim at the accomplishment of that its paramount purpose. It surely, therefore, is absurd to suppose that all or many of the members of any inchoate community would have determinate notions concerning the scope of their union, or concerning the means to its attainment. Consequently, most or many of the original subjects would not apprehend the object of the original sovereign's promise; and, not apprehending its object, they would not accept it in effect, although they might accept it in show. With regard to them, the promise of the original sovereign would be hardly a covenant or pact, but a mere pollicitation.

The remarks which I have now made on the promise of the original sovereign, will apply, with a few obvious adaptations, to the promise of the original subjects.

314. If you would suppose an original covenant which as a mere hypothesis will hold good, you must suppose that the society about to be formed is composed entirely of adult members; that all these adult members are persons of sane mind, and even of much sagacity and much judgment; and fairly acquainted with political and ethical science. On these bare possibilities, you may build an original covenant which shall be a coherent fiction.

315. It is hardly necessary to add that the hypothesis of the original covenant, in any of its forms or shapes, has no foundation in actual facts. There is no historical evidence that the hypothesis has ever been realized; that the formation of any society political and independent has actually been preceded by a proper original covenant, or by aught approaching to the idea.

316. In a few societies political and independent (as, for example, in the Anglo-American States), the sover-

eign political government has been determined at once, and agreeably to a scheme or plan. But, even in these societies, the parties who determined the constitution (either as scheming or planning, or as simply voting or adopting it) were merely a slender portion of the whole of the independent community, and were virtually sovereign therein before the constitution was determined; insomuch that the constitution was not constructed by the whole of an inchoate community, but rather was constructed by a fraction of a community already consummate or complete. In most societies political and independent, the constitution of the supreme government has grown. By which fustian but current phrase I intend not to intimate that it hath come of itself, or is a marvellous something fashioned without hands. I mean that its constitution has been the work of a long series of authors, comprising the original members and many generations of their followers. And the same may be said of most of the ethical maxims which opinions current with the subjects constrain the sovereign to observe. The original sovereign government could not have promised its subjects to govern by those maxims. For the current opinions which actually enforce those maxims, are not coeval with the independent political society, but rather have arisen insensibly since the society was formed. In some societies political and independent, oaths or promises are made by rulers on their accession to office. But such an oath or promise, and an original covenant to which the original sovereign is a promising party, have little or no resemblance. That the formation of the society political and independent preceded the conception of the oath itself, is commonly implied by the terms of the latter. The swearing party, moreover, is commonly a limited monarch, or occupies some position like that of a limited monarch; that is to say, the swearing party is

not sovereign, but is merely a limb or member of a sovereign body.

317. It is said, however, by the advocates of the hypothesis (for the purpose of obviating the difficulty which these negative cases present), that a tacit original covenant preceded the formation of the society, although its formation was not preceded by an express covenant of the kind.

318. Now the only difference between an express, and a tacit or implied convention, lies in this: That, where the convention is express, the intention and acceptance are signified by language, or by signs which custom or usage has rendered equivalent to language; but that, where the convention is tacit or implied, the intention and acceptance are not signified by words, or by signs which custom or usage has made tantamount to words.

319. Most or many, therefore, of the members of the inchoate society, could not have been parties, as promisors or promisees, to a tacit original covenant. For they could not have conceived the object with which, according to the hypothesis, an original covenant is concerned; and could not have signified in any way an intention which they were not competent to entertain.

320. Besides, in many of the negative cases to which I now am adverting, the position and deportment of the original sovereign government, and the position and deportment of the bulk of the original subjects, exclude the supposition of a tacit original covenant. For example: Where the original government begins in a violent conquest, it scarcely promises tacitly, by its violence towards the vanquished, that it will make their weal the paramount end of its rule. And a tacit promise to render obedience to the intrusive and hated government, scarcely passes from the reluctant subjects. They presently will to obey it, or presently refuse to

obey it, because they are constrained to obey it, by their fear of its military sword. But the will or consent to obey it presently, to which they are thus constrained, is scarcely a tacit promise (or a tacit manifestation of intention) to render it future obedience. For they intimate pretty significantly, by the reluctance with which they obey it, that they would kick with all their might against the intrusive government, if the military sword which it brandishes were not so long and fearful.

321. By certain of the later advocates of the hypothesis of the original covenant (chiefly German writers on political government and society), it is commonly admitted that original covenants are not historical facts; but they zealously maintain, notwithstanding this sweeping admission, that the only sufficient basis of an independent political society is a fundamental civil pact. I will not undertake to guide the student into the transcendental regions where this language is supposed to have a meaning.\*

\* For the notions or language, concerning the original covenant, of German writers on political government and society, I refer the curious reader to the following books.—1. Kant's *Metaphysical Principles of Jurisprudence*. For the original covenant, see the head *Das Staatsrecht*.—2. A well made *Philosophical Dictionary* (in four octavo volumes), by Professor Krug of the University of Leipzig. For the original covenant, see the article *Staatsursprung*.—3. An exposition of the Political Sciences (*Staatswissenschaften*), by Professor Politz of the same University: an elaborate and useful work in five octavo volumes. For the original covenant, see the head *Staats und Staatsenrecht*.—4. The *Historical Journal* (for Nov., 1799) of Fr. v. Gentz: a celebrated servant of the Austrian government.

For, in Germany, the lucid and coherent doctrine to which I have adverted in the text, has not been maintained exclusively by mere metaphysical speculators, and mere university-professors, of politics and jurisprudence. We are gravely assured by Gentz, that the original covenant (meaning this same doctrine touching the original covenant) is the very basis of the science of politics: that, without a correct conception of the original covenant, we can not judge soundly on any of the questions or problems which the science of politics presents. "*Der gesellschaftliche Vertrag* (says he) *ist die Basis der allgemeinen Staatswissenschaft. Eine richtige Vorstellung von diesem Vertrage ist das erste Erforderniss zu einem reinen Urtheile über alle Fragen und Aufgaben der Politik.*" Nay, he thinks that this same doctrine touching the original covenant, is probably the happiest result of the newer German philosophy; insomuch that the



322. 3. I close my strictures on the hypothesis of the original covenant, with the following remark :

It would seem that the hypothesis was suggested to its authors, by one or another of these suppositions. 1. Where there is no convention, there is no duty. In other words, whoever is obliged is obliged through a promise given and accepted. 2. Every convention is necessarily followed by a duty. In other words, wherever a promise is given and accepted, the promising party is obliged through the promise, let its object and tendency be what they may. It is assumed, expressly or tacitly, by Hobbes, Kant, and others, that he who is bound, has necessarily given a promise, and that he who has given a promise is necessarily bound.

But both suppositions are grossly and obviously false.—Of religious, legal, and moral duties, some are imposed by the laws which are their respective sources, through or in consequence of conventions. But others are annexed to facts which have no resemblance to a convention, or to aught that can be deemed a promise. Consequently, a sovereign government might lie under duties to its subjects, and its subjects might lie under duties towards itself, though neither it nor its subjects were bound through a pact.—And as duties are annexed to facts which are not pacts or conventions, so are there pacts or conventions which are not followed by duties. Conventions are not enforced by divine or human law without reference to their objects and tendencies. There are many conventions which positive morality reprobates ; there are many which positive law will not sustain, and many which positive law actively annuls ; there are

fairest product of the newer German philosophy is the conceit of an original covenant which never was made anywhere, but which is the necessary basis of political government and society.—Warmly admiring German literature, and profoundly respecting German scholarship, I can not but regret the proneness of German philosophy to vague and misty abstraction.

many which conflict with the law of God, inasmuch as their tendencies are generally pernicious. Consequently, although the sovereign and subjects were parties to an original covenant, neither the sovereign nor subjects would of necessity be bound by it.

323. From the origin or causes of political government and society, I pass to the distinction of sovereign governments into governments *de jure* and governments *de facto*. For the two topics are so connected, that the few brief remarks which I shall make on the latter, may be placed aptly at the end of my disquisition on the former.

324. In respect of the distinction now in question, governments are commonly divided into three kinds: First, governments which are governments *de jure* and also *de facto*; secondly, governments which are governments *de jure* but not *de facto*; thirdly, governments which are governments *de facto* but not *de jure*. A government *de jure* and also *de facto*, is a government deemed lawful or deemed rightful or just, which is present or established; that is to say, which receives presently habitual obedience from the bulk or generality of the members of the independent political community. A government *de jure* but not *de facto* (shortly expressed by the elliptical phrase "a government *de jure*") is a government deemed lawful, or deemed rightful or just, which, nevertheless, has been supplanted or displaced; that is to say, which receives not presently (although it received formerly) habitual obedience from the bulk of the community. A government *de facto* but not *de jure* (or more shortly "a government *de facto*"), is a government deemed unlawful, or deemed wrongful or unjust, which, nevertheless, receives presently habitual obedience from the bulk of the community.

325. In respect of positive law, a sovereign political government which is established or present, is neither lawful nor unlawful: In respect of positive law, it is neither rightful nor wrongful, it is neither just nor unjust. It is therefore neither legal or illegal.

326. In every society political and independent, the actual positive law is a creature of the actual sovereign. Law, no longer enforced by the present supreme government would cease to be law in the sense of positive law. To borrow the language of Hobbes, "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law."

327. Consequently, an established sovereign government, in respect of the positive law of its own independent community, is neither lawful nor unlawful. For if so, it were lawful or unlawful by some law either of its own appointment, or by the appointment of another sovereign. The former alternative is manifestly absurd; and the latter is contrary to the hypothesis of its sovereignty.

328. In respect of the positive law of that independent community wherein it once was sovereign, a so-called government *de jure* but not *de facto*, is not, and can not be, a lawful government; for by the positive law of the community, which exists by the authority of the government *de facto*, the supplanted government is proscribed, and attempts to restore it are made legal wrongs. In respect of the positive law of another independent community, a so-called government *de jure* but not *de facto* is neither lawful or unlawful. For by the hypothesis, the other independent community has no power recognized by habitual obedience by which it can interfere.

329. In respect, then, of positive law, the distinction of sovereign governments into lawful and unlawful is a

distinction without a meaning. For, as tried by this test, or as measured by this standard, a so-called government *de jure* but not *de facto* can not be lawful; and, as tried by the same test, or measured by the same standard, a government *de facto* is neither lawful nor unlawful.

330. In respect, however, of positive morality, the distinction of sovereign governments into lawful and unlawful, is not a distinction without a meaning.

331. A government *de facto* may be lawful, or a government *de facto* may be unlawful, in respect of the positive morality of that independent community wherein it is established. If the opinions of the bulk of the community favor the government *de facto*, the government *de facto* is morally lawful in respect of the positive morality of that particular society. If the opinions of the bulk of the community be adverse to the government *de facto*, it is morally unlawful in respect of the same standard.

332. And a government *de facto*, or a government not *de facto* may be morally lawful, or morally unlawful, in respect of the positive morality which obtains between nations or states. Though positive international morality looks mainly at the possession, every government in possession, or every government *de facto*, is not acknowledged of course by other established governments. In respect, therefore, of positive international morality, a government *de facto* may be unlawful, whilst a government not *de facto* may be a government *de jure*.

333. A government, moreover, *de facto*, or a government not *de facto*, may be lawful or unlawful in respect of the law of God. Tried by the Divine law, as known through the principle of utility, a sovereign government *de facto* is lawfully a sovereign government, if the gen-

eral happiness or weal requires its continuance. Tried by the same law, as known through the same index, a sovereign government *de facto* is not lawfully sovereign, if the general happiness or weal requires its abolition.

334. The definition of a positive law implicitly contained in the foregoing lectures, and which has been already stated by anticipation (p. 116 *supra*), may now be reiterated in terms which have been explained with an approach to precision. The essential difference which severs a positive law from a law not a positive law is this:—Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme. In other words, It is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author.

335. The definition, however, only approaches to a perfectly complete and perfectly exact definition. It is open to certain correctives which I will now briefly suggest.

336. Every law properly so called is set by a superior to an inferior or inferiors; it is set by a party armed with might, to a party or parties whom that might can reach. Now (speaking generally) a party who is liable to be reached by the might of the author of the law is a member of the independent community wherein the author is sovereign. In other words, a party who is amenable to a legal sanction is a subject of the author of the law to which the sanction is annexed. Although the positive law may affect to oblige strangers (or parties who are not members of that independent community), none but members of that independent community are virtually or truly bound by it. Besides, if the positive law of one independent community bound legally (and generally) the

members of another, the other independent community would not be an independent community, but merely a subordinate community forming a limb of the first.

337. Speaking, then, generally, we may say that a positive law is set or directed exclusively to a subject or subjects of its author; or that a positive law is set or directed exclusively to member or members of the community wherein its author is sovereign. But, in many cases, the positive law of a given independent community imposes a duty on a stranger; on a party who is not a member of the given independent community, or is only a member to certain limited purposes. For such, in these cases, is the position of the stranger, that the imposition of the legal duty consists with the sovereignty of the government of which he is properly a subject. For example: A party not a member of a given independent community, but living within its territory and within the jurisdiction of its sovereign, is bound or obliged, to an extent which is limited by its positive law. Living within the territory, he is liable to be reached by the legal sanctions by which the law is enforced. And the legal duties imposed upon him by the law are consistent with the sovereignty of the foreign government of which he is properly a subject. For the duties are not imposed upon the foreign government itself, nor upon the members generally of the community subject to it, nor are they laid upon the obliged party as being one of its subjects, but as being a member, to certain limited purposes, of the community wherein he resides. Again: If a stranger not residing within the given community be the owner of land or movables lying within its territory, the sanction of the law may reach him through the land or goods. For instance, if he be sued on an agreement, and judgment be given for the plaintiff, the tribunal may execute its judgment by resorting to the land or mov-

ables, although the defendant's body is beyond the reach of its process. And this consists with the sovereignty of the government of which the stranger is properly a subject. In all the cases, therefore, which I now have noted and exemplified, the positive law of a given independent society may impose a duty on a stranger. By reason of the obstacles mentioned in the preceding paragraph, the binding virtue of the positive law can not extend generally to members of foreign communities. But in the cases which I now have noted and exemplified those obstacles do not intervene.

The definition, therefore, of a positive law, which is assumed expressly or tacitly throughout the foregoing lectures, is not a perfectly complete and perfectly exact definition. In the cases noted and exemplified in the last paragraph, a positive law obliges legally, or a positive law is set or directed to a stranger or strangers; that is to say, a person or persons not of the community wherein the author of the law is sovereign or supreme. Now, since the cases in question are omitted by that definition the definition is too narrow, or is defective or inadequate and to a corresponding extent the determination of the province of jurisprudence, which is attempted in these discourses, falls short of being a complete and exact determination.

338. But the truth of the positions and inferences contained in the preceding lectures is not, I believe, materially impaired by this omission and defect. And though the definition is not complete, it approaches nearly to completeness. Allowing for the omission of the anomalous cases in question, it is I believe an adequate definition of its subject.

339. I have said that a given society is a society political and independent, if the bulk or generality of its members habitually obey the commands of a determinate

individual, or body of individuals, not obeying habitually the express or tacit commands of a determinate human superior. But by what characters, or by what distinguishing marks, are the members of a given society severed from persons who are not of its members? Or how is a given person determined to a given community? These questions are not resolved or touched by my definition; and it might seem, therefore, that the definition is not complete or adequate. But, for the following reasons, I believe that the foregoing definition, considered as a general definition, is, notwithstanding, complete or adequate; that a general definition of independent political society could hardly resolve the questions which I have suggested above.

340. 1. It is not through one mode, or it is not through one cause, that the members of a given society are members of that community. A person may be determined to a given society, by any of numerous modes, or by any of numerous causes; as, for example, by birth within the territory which it occupies; by birth without its territory, but of parents being of its members; by simple residence within its territory; or by naturalization.\* Again: a subject member of one society may be, at the same time, a subject member of another. A person, for example, who is naturalized in one independent society, may yet be a member completely, or to certain limited purposes, of that independent society which he affects

\* The following brief explanation may be placed pertinently here:

Generally speaking, a society political and independent occupies a determined territory. Consequently, when we imagine an independent political society, we commonly imagine it in that plight: And, according to the definition of independent political society which is assumed expressly or tacitly by many writers, the occupation (by the given society) of a determined territory, or seat, is of the very essence of a society of the kind. But this is an error. History presents us with societies of the kind which have been, as it were, in transitu. Many, for example, of the barbarous nations which invaded and settled in the Roman Empire, were not, for many years before their final establishment, occupants of determined seats



to renounce; or a member of one society who simply resides in another, may be a member completely of the former society, and, for limited purposes, a member of the latter. Nay, a person who is sovereign in one society, may be, at the same time, a subject member of another. Before I could have resolved these questions I must have descended into the detail of jurisprudence; and therefore I must have wandered from the proper purpose or scope of the foregoing general attempt to determine the province of the science.

341. 2. By a general definition of independent political society (or such a definition as is applicable to every society of the kind), I could not have resolved completely the questions suggested above, although I had discussed the topics touched in the last paragraph. For the modes through which persons are members of particular societies (or the causes by which persons are determined to particular societies) differ in different communities. It therefore is only in relation to a given particular society that the questions suggested above can be completely resolved.

342. I have assumed expressly or tacitly throughout the foregoing lectures that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, can not be bound legally. This needs a slight explanation, which may be placed conveniently at the close of my present discourse.

343. It is true universally that, as being the sovereign of the community wherein it is sovereign, a sovereign government can not be bound legally; and this is the sense with which I have maintained the position throughout the present lecture. But, as being a subject of a foreign supreme government (either generally or to certain limited purposes), it may be bound by laws (simply and strictly so called) of that foreign supreme govern-

ment. And if the laws be exclusively laid upon it as subject in the foreign community, its sovereignty is not impaired by the obedience which it yields to them, although the obedience amounts to a habit. The following case will amply illustrate the meaning which I have stated in general expressions. Before the French revolution, the sovereign government of the Canton of Bern had money in the English funds; and if the English law empowered it to hold lands, it might be the owner of lands within the English territory, as well as the owner of money in the English funds. Now, assuming that the government of Bern is an owner of lands in England, it also is subject to the legal duties with which property in land is saddled by the English law. But by its subjection to those duties, and its habitual observance of the law through which those duties are imposed, its sovereignty in its own Canton is not annulled or impaired. For the duties are incumbent upon it (not as governing there, but) as owning lands here; as being, to limited purposes, a member of the British community, and amenable, through the lands, to the process of the English tribunals.

I said in an earlier part of this lecture (p. 165 *supra*), that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, can not have legal rights (in the proper acceptance of the term) against its own subjects. In the sense with which I have advanced it, the position will hold universally. But it needs a slight explanation, which I will now state or suggest.

**344.** It is true universally, that against a subject of its own, as being a subject of its own, a sovereign political government can not have legal rights; and this is the sense with which I have advanced the position. But against a subject of its own, as being generally or partially

a subject of a foreign government, a sovereign political government may have legal rights. For example: Let us suppose that a Russian merchant is resident and domiciled in England: that he agrees with the Russian emperor, to supply the latter with naval stores: and that the laws of England, or the English tribunals lend their sanctions to the agreement. Now, according to these suppositions, the emperor bears a right, given by the law of England, against a Russian subject. But the emperor has not the right through a law of his own, or against a Russian subject in that capacity or character. He bears the legal right against a subject of his own, through the positive law of a foreign independent society; and he bears it against his subject (not as being his subject, but) as being, to limited purposes, a subject of a foreign sovereign. And the relative legal duty lying on the Russian merchant consists with the emperor's autocracy in all the Russias. For since it lies upon the merchant as resident and domiciled in England, the sovereign British Parliament, by imposing the duty upon him, does not interfere with the autocrat in his own independent community.

## DIVISION II.

### GENERAL JURISPRUDENCE DISTINGUISHED FROM PARTICULAR.

#### LECTURE XI.\*

*On general as distinguished from particular jurisprudence.*

345. Having determined the province of jurisprudence, I now proceed to distinguish general jurisprudence, or the philosophy of positive law, from what may be styled particular jurisprudence, or the science of particular law: that is to say, the science of any such system of positive law as now actually obtains, or once actually obtained, in a specifically determined political society.

346. The appropriate subject of jurisprudence, in any of its different departments, is positive law: meaning by positive law, law established or "positum," in an independent political society, by the express or tacit authority of its sovereign or supreme government.

347. Considered as a whole, and as implicated or connected with one another, the positive laws or rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or

\* The preceding six lectures comprise the substance of the first ten lectures as actually delivered, being those which were revised and enlarged by the author himself, and published by him (in 1832) in the form of six lectures in the volume entitled "The Province of Jurisprudence Determined."—R. C.

to any of its component parts, jurisprudence is particular or national.

348. Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

349. Many of these common principles are common to all systems;—to the scanty and crude systems of rude communities, and the ampler and maturer systems of refined societies. But the ampler and maturer systems of refined societies are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems are the subject of an extensive science: which, as contradistinguished to particular jurisprudence on one side, and on another, to the science of legislation, has been named general (or comparative) jurisprudence, or the philosophy of positive law. This science is the topic, and measures the scope of the present course of lectures. Of all the concise expressions which I have turned in my mind, “the philosophy of positive law” is the most significant to mark it. I have borrowed the expression from a treatise by Hugo, a celebrated professor of jurisprudence in the University of Gottingen, and the author of an excellent history of the Roman law. Although the treatise in question is entitled “the law of nature,” it is not concerned with the law of nature in the usual meaning of the term. In the language of the author, it is concerned with “the law of nature as a philosophy of positive law.” But though this expression is happily chosen, the subject and scope of the treatise are conceived indistinctly. General jurisprudence, or the philosophy of positive law, is blended and confounded, from the be-

ginning to the end of the book, with the portion of deontology or ethics, which is styled the science of legislation : while, as I shall show immediately, general jurisprudence, or the philosophy of positive law, is not concerned directly with the science of legislation.

350. As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it adverts to considerations of utility, it adverts to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation, which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

351. If the possibility of such a science as that which I have undertaken to expound appear doubtful, the doubt arises from this: that in each particular system, the principles and distinctions which that system has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself.

352. It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect different systems differ. But, in all, they are to be found more or less nearly conceived ; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.

353. I mean, then, by "General Jurisprudence," the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law; understanding by systems of law the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently instructive.

354. Of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we can not imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

355. Of these necessary principles, notions, and distinctions, I will suggest briefly (by way of anticipation of the more full analysis to be given hereafter) a few examples.

356. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society:

357. 2. The distinction between written and unwritten law, in the juridical or improper senses attributed to the opposed expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

358. 3. The distinction of Rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights arising from contracts):

359. 4. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion:

360. 5. The distinction of Obligations (or of duties corresponding to rights against persons specifically determined) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations "*quasi ex contractu*":

361. 6. The distinction of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptation of the term), and breaches of obligations from contracts, or of obligations "*quasi ex contractu*."

362. It will, I believe, be found on a little examination and reflection that every system of law evolved in a refined community implies the notions and distinctions which I now have cited as examples: together with a multitude of conclusions imported by those notions and distinctions, and drawn from them by the builders of the system through inferences nearly inevitable.

363. Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they in fact occur very generally in matured systems of law: and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

364. Such, for example, is the distinction of law into "*jus personarum*" and "*jus rerum*": which is the leading principle of the scientific arrangement given to the Roman Law by the authors of the elementary treatises



from which Justinian's Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those who have attempted such arrangements in the modern European nations. It has been very generally adopted by the compilers of the authoritative Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it as denoted by the obscure antithesis of of "*jus personarum et rerum*," have yet adopted it under other (and certainly more appropriate) names as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodizer of a body of law would naturally (or of course) adopt it.

365. But it will be impossible, or useless, to attempt an exposition of these principles, notions, and distinctions, until by careful analysis we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science; which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, besides Law, which I have endeavored to define in the preceding lectures, are the following: Right, Obligation, Injury, Sanction, Person, Thing, Act, Forbearance. Unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk.

366. It is not unusual with writers who call and think themselves "institutional," to take for granted that they know the meaning of these terms, and that the meaning

must be known by those to whom they address themselves.

367. These terms, nevertheless, are beset with numerous ambiguities; their meaning, instead of being simple, is extremely complex. They are short marks for long series of propositions. And what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsists between them. To state the signification of each, and to show the relation in which it stands to the others, is not a thing to be accomplished by short and disjointed definitions, but demands a dissertation, long, intricate, and coherent.

368. The proper subject then of General Jurisprudence (as distinguished from the Science of Legislation) is a description of such subjects and ends of Law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.

369. And these resemblances will be found to be very close, and to cover a large part of the field. They are necessarily confined to the resemblances between the systems of a few nations; since it is only a few systems with which it is possible to become acquainted, even imperfectly. And it is only the systems of two or three nations, which deserve attention; the writings of the Roman Jurists; the decisions of English Judges in modern times; the provisions of French and Prussian codes as to arrangement.\*

\* Evidently the author was not acquainted with the works of the Scotch Institutional writers. The Scotch law is in the main based upon the Roman. But as expounded by its institutional writers, and notably by Lord Stair, whose work was a treatise on general jurisprudence illustrated by the law of Scotland in particular, the law of Scotland holds an important and independent position, both in regard to general jurisprudence, and as an aid to the historical study of English law.—R. C.

370. It is impossible to consider Jurisprudence quite apart from Legislation: since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible.

371. Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the difference; whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the ends of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are owing partly to the different circumstances in which the communities are placed; partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

372. So far as these differences are inevitable—are imposed by force of circumstances—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame. I shall, however, treat them not as subjects of either, but merely as effects of those respective causes. So of the admission or prohibition of divorce—Marriages within certain degrees, &c.

373. Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; and it may be questioned whether earnestness be less favorable to impartiality than indifference; but he ought not to attempt to insinuate his opinion of merit and demerit under pretense of assign-

ing causes. In certain cases which do not try the passions (as rescission of contract for inadequacy of consideration) he may, with advantage, offer opinions upon merits and demerits. These occasional excursions into the territory of Legislation, may serve to give a specimen of the manner in which such questions should be treated. This particularly applies to Codification; a question which may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist.

374. Expounding principles and distinctions which are the appropriate matter of General Jurisprudence, I shall present them abstracted from every particular system. But I shall also endeavor to illustrate them by example from the two particular systems which I have studied with some accuracy, namely, the Roman Law and the Law of England.

375. For the following sufficient reason (to which many others might be added), the Roman or Civil Law is, of all particular systems, other than the Law of England, the best of the sources from which such illustrations might be drawn.

376. In some of the nations of modern Continental Europe (as, for example, in France), the actual system of law is mainly of Roman descent; and in others of the same nations (as, for example, in the States of Germany), the actual system of law, though not descended from the Roman, has been closely assimilated to the Roman by large importations from it.

377. Accordingly, in most of the nations of modern Continental Europe, much of the substance of the actual system, and much of the technical language in which it is clothed, is derived from the Roman Law, and without some knowledge of the Roman Law the techni-

cal language is unintelligible; whilst the order or arrangement commonly given to the system imitates the exemplar of a scientific arrangement which is presented by the Institutes of Justinian. Even in our own country, a large portion of the Ecclesiastical Law, and some portion of Equity and Common Law, is derived immediately from the Roman Law, or from the Roman through the Canon.

378. Nor has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tainted the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities.

379. It is much to be regretted that the study of the Roman Law is neglected in this country, and that the real merits of its founders and expositors are so little understood.

380. Much has been talked of the philosophy of the Roman Institutional writers. Of familiarity with Grecian philosophy there are few traces in their writings, and the little that they have borrowed from that source is the veriest foolishness: for example, their account of *Jus naturale*, in which they confound law with animal instincts; law, with all those wants and necessities of mankind which are causes of its institution.

381. Nor is the Roman law to be resorted to as a magazine of legislative wisdom. The great Roman Lawyers are, in truth, expositors of a positive or technical system. Not Lord Coke himself is more purely

technical. Their real merits lie in their thorough mastery of that system; in their command of its principles; in the readiness with which they recall, and the facility and certainty with which they apply them.

382. In support of my own opinion of these great writers I shall quote the authority of two of the most eminent Jurists of modern times.

383. "The permanent value of the *Corpus Juris Civilis*," says Falck, "does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristical writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages, and pre-eminently fitted them to produce and to develop those qualities of the mind which are requisite to form a Jurist." \*

384. And Savigny says, "It has been shown above, that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman Jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics; and it may be said without exaggeration that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory

\* Jurist. Encyc. cap. ii., § 109.

and practice are not in fact distinct ; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied ; in every case, the rule by which it is determined ; and in the facility with which they pass from the general to the particular and the particular to the general, their mastery is indisputable." \*

385. In consequence of this mastery of principles, of their perfect consistency (" *elegantia* ") and of the clearness of the method in which they are arranged, there is no positive system of law which it is so easy to seize as a whole. The smallness of its volume tends to the same end.

386. The principles themselves, many of them being derived from the barbarous ages, are indeed ill-fitted to the ends of law ; and the conclusions at which they arrive being logical consequences of their imperfect principles necessarily partake of the same defect.

387. A subordinate merit of the Roman lawyers is their style, always simple and clear, commonly brief and nervous, and entirely free from nitor. Its merits are appropriate and in perfect taste.

388. The number of the analogies between the Roman Law and many of the Continental systems, and between the Roman and English Law, is not indeed to be wondered at ; since those Continental systems and also our system of Equity, have been formed more or less extensively on the Roman law : chiefly on the Roman through the Canon. But the English Law, like the Roman, is for the most part indigenous, or comparatively little has been imported into it from the Roman. The coincidences show how numerous are the principles and

\* Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, cap. iv.

distinctions which all systems of law have in common. The extensive coincidence of particular systems may be ascertained practically by comparing two expositions of any two bodies of law. The coincidence is pre-eminently remarkable in the Roman Law and the Common Law of England.

389. The subject and scope of general jurisprudence, as contradistinguished to particular jurisprudence, are well expressed by Hobbes in that department of his *Leviathan* which is concerned with civil (or positive) laws. "By civil laws," says he, "I understand the laws that men are therefore bound to observe, because they are members, not of this or that commonwealth in particular, but of a commonwealth. For the knowledge of particular laws belongeth to them that profess the study of the laws of their several countries; but the knowledge of civil laws in general to any man. The ancient law of Rome was called their 'civil law' from the word *civitas*, which signifies a commonwealth: And those countries, which, having been under the Roman empire, and governed by that law, still retain such part thereof as they think fit, call that part the 'civil law,' to distinguish it from the rest of their own civil laws. But that is not it I intend to speak of. My design is to show, not what is law here or there, but what is law: As Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law."

390. Having stated generally the nature of the science of Jurisprudence, and the manner in which I think it ought to be expounded, I proceed to indicate a few of its uses.

391. I would remark, in the first place, that a well-grounded study of the principles which form the subject of the science, would be an advantageous preparative for the study of English law.

392. To the student who begins the study of the Eng-



lish Law, without some previous knowledge of the rationale of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity.

393. With comparative ease and rapidity he might perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of the structure.

394. In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of them tends to engender, would enable him to acquire the principles of English jurisprudence in particular, far more speedily and accurately than he possibly could have acquired them in case he had begun the study of them without the preparative discipline.

395. There is (I believe) a not unprevalent opinion that the study of the science whose uses I am endeavoring to demonstrate, might tend to disqualify the student for the practice of the law, or to inspire him with an aversion to the practice of it. That some who have studied this science have shown themselves incapable of practice, or that some who have studied this science have conceived a disgust for practice, is not improbably a fact. But in spite of this seeming experience in favor of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it.

396. A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well grounded knowledge of the principles of English juris

prudence ; and a previous well-grounded knowledge of the principles of English jurisprudence can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draftsman. Armed with that previous knowledge, he seizes the rationale of the practice which he there witnesses and partakes in, with comparative ease and rapidity ; and his acquisition of practical knowledge and practical dexterity and readiness is much less irksome than it would be in case it were merely empirical. Inasmuch that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.

397. The advantage of the study of common principles and distinctions, and of history considered as a preparative for the study of one's own particular system, is fully appreciated in Prussia ; a country whose administrators, for practical skill, are at least on a level with those of any country in Europe.

398. In the Prussian Universities, little or no attention is given by the Law Faculty to the actual law of the country. Their studies are wholly or almost entirely confined to the general principles of law ; to the Roman, Canon, and Feudal law, as the sources of the actual system ; the Government trusting that those who are acquainted with such general principles and with the historical basis of the actual system, will acquire that actual system more readily, as well as more groundedly, than if they had been at once set down to the study of it, or had tried to acquire it empirically.

399. "In the Prussian states," says Savigny, "ever since the establishment of the Landrecht, no order of

study has ever been prescribed; and this freedom from restraint, sanctioned by the former experience of the German Universities, has never been infringed upon. Even the number of professors, formerly required on account of the Common Law (*Gemeines Recht*) has not been reduced, and the curators of the universities have never led either the professors or the students to believe that a part of the lectures, formerly necessary, were likely to be dispensed with. Originally it was thought advisable that in each University one chair at least should be set apart for the Prussian law, and a considerable prize was offered for the best manual. But even this was subsequently no longer required; and, up to the present time, the Prussian law has not been taught at the University of Berlin. The established examinations are formed upon the same principle; the first, on the entrance into real matters of business, turning exclusively on the common law; the next period is set apart for the directly practical education of the *jurisconsults*; and the two following examinations are the first that have the *Landrecht* for their subject-matter; at the same time, however, without excluding the common law. At present, therefore, juridical education is considered to consist of two halves; the first half (the university) including only the learned groundwork; the second, on the other hand, having for its object the knowledge of the *Landrecht*, the knowledge of the Prussian procedure, and practical skill." \*

400. The opinion I have expressed was that of Hale, Mansfield,† and others (as evinced by their practice), and

\* Savigny, *Vom Beruf*, &c., Hayward's translation, p. 165.

† "Lord Hale often said, the true grounds and reasons of law were so well delivered in the (Roman) Digest, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England."—Burnet's *Life*, p. 7.

was recommended by Sir William Blackstone, more than a century ago.\*

401. Backed by such authority, I think I may conclude that the science in question, if taught and studied skillfully and effectually, and with the requisite detail, would be no inconsiderable help to the acquisition of English Law.

402. I may also urge the utility of acquiring the talent of seizing or divining readily the principles and provisions (through the mist of a strange phraseology) of other systems of law, were it only in a mere practical point of view :

403. 1. With a view to practice, or to the administration of justice in those of our foreign dependencies wherein foreign systems of law more or less obtain. 2. With a view to the systems of law founded on the Roman directly, or through the Canon or the Roman, which even at home have an application to certain classes of objects. 3. With a view to questions arising incidentally, even in the Courts which administer indigenous law. 4. With a view to the questions in the way of appeal coming before the Privy Council: A court which is bound to decide questions arising out of numerous systems, without the possibility of judges or advocates having any specific knowledge of them; an evil for which a familiarity with the general principles of law on the part of the Court and advocates is the only conceivable palliative.

404. For, certainly, a man familiar with such principles, as detached from any particular systems, and accustomed to seize analogies, will be less puzzled with Mohammedan or Hindoo institutions than if he knew them only in

\* Blackstone recommends the study of the Law of Nature, and of the Roman Law, in connection with the study of the particular grounds of our own. By Law of Nature, &c., he seems to mean the very study which I am now commending.

concreto, as they are in his own system ; nor would he be quite so inclined to bend every Hindoo institution to the model of his own.

405. And (secondly) without some familiarity with foreign systems, no lawyer can or will appreciate accurately the defects or merits of his own.

406. And as a well-grounded knowledge of the science whose uses I am endeavoring to demonstrate, would facilitate to the student the acquisition of the English Law, so would it enable him to apprehend, with comparative ease and rapidity, almost any of the foreign systems to which he might direct his attention. So numerous, as I have said, are the principles common to systems of law, that a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community. So that the difficulty with which a lawyer, versed in the law of his own country, apprehends the law of another, is rather the result of differences between the terms of the systems, than of substantial or real differences between their maxims and rules.

407. Now the obstacle to the apprehension of foreign systems which is opposed by their technical language, might in part be obviated or lightened to the student of General Jurisprudence, if the science were expounded to him competently, in the method which I shall endeavor to observe. If the exposition of the science were made agreeably to that method, it would explain incidentally the leading terms, as well as the leading principles, of the Roman or Civil Law. And if the student were possessed of those terms, and were also grounded thoroughly in the law of his own country, he would master with little difficulty the substance of the Roman system, and of any of the modern systems which are mainly derivatives from the Roman.

## DIVISION III.

### ANALYSIS OF PERVADING NOTIONS.

#### LECTURE XII.

##### *Analysis of the term Right—Person, &c.*

408. By the analysis contained in the first six lectures determining the province of jurisprudence and thereby defining the term law in its strict sense, I have in part effected the object the necessity of which I adverted to in the last lecture, namely, of determining by careful analysis the meaning of the terms employed in the science which I am expounding. In further pursuance of that object, I shall now endeavor to unfold the essential properties of Rights; meaning by Rights, legal rights;—rights which are creatures of Law strictly or simply so called.

409. There are, indeed, Rights which arise from other sources; namely, from the laws of God or Nature, and from laws which are sanctioned morally. But these I shall not pause to examine formally, although I shall advert to them in the course of the ensuing Lectures. At present, I dismiss them with the following remarks: 1st, Like the Obligations to which they correspond, they are imperfect, in so far as they are not armed with the legal sanction. 2ndly, The Rights (if such they can be called) which are conferred by positive morality, partake of the

nature of the source from which they emanate. So far as positive morality consists of laws improper, the rights which are said to arise from it are rights by way of analogy.

410. For example, rights derived from the Law of Nations are related to rights derived from positive Law, by a faint resemblance. They are neither armed with the legal sanction, nor are they creatures of Law established by determinate superiors. They are not therefore rights strictly so called. But, according to received language, they are called rights ; thus, for example, we speak of rights created by treaty.

411. In attempting to explain the nature of a legal Right, I must advert to the import of the following terms :

412. 1. Law, Duty, and Sanction. For, though every law does not create a right, every right is the creature of Law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction.

413. 2. Person, Thing, Act, and Forbearance. For rights reside in persons, and relate to persons, things, acts, and forbearances, as the matter about which they are conversant.

414. 3. Injury, Wrong, or Breach of Obligation or Duty by commission or omission. For as rights imply obligations and sanctions, so do obligations or sanctions imply possible injuries or wrongs.

415. 4. Intention and Negligence (including under the latter of these terms what may be called rashness or temerity). For every injury supposes intention or negligence on the part of the wrongdoer.

416. 5. Will and Motive. For the import of the expressions "will" and "motive" is implied in the import of the expressions "intention" and "negligence." And

obligations and sanctions operate upon the will of the obliged, and are thereby distinguished from the compulsion, which (for want of a better name) may be styled merely physical.

417. I shall also interpose an explanation of Political or Civil Liberty:—a term not unfrequently synonymous with right; but which often denotes simply exemption from obligation, conferred by permission. For it will be shown in the sequel that when the law only permits, it as clearly confers a right as when it commands.

418. While attempting to explain the import of the term “Right,” and touching upon the import of the several terms or expressions which I have now enumerated, I shall advert to the ambiguities by which some of them are obscured. Each of these expressions is so implicated with the rest, that the explanation of any one of them involves allusions to the others. For this reason, the student after a careful perusal of the analysis of pervading notions contained in this section of the present work, should reperuse in detail every part of the section so as to appreciate its bearing upon the whole.

419. Every Law (properly so called) is a Command.

420. By every command, an obligation is, by virtue of the corresponding sanction, imposed upon the party to whom it is addressed or intimated.

421. Every Obligation or Duty (terms which, for the present, I consider as synonymous) is positive or negative. In other words, the party upon whom it is incumbent is commanded to do or perform, or is commanded to forbear or abstain.

422. A duty to deliver goods agreeably to a contract, to pay damages in satisfaction of a wrong, or to yield the possession of land in pursuance of a judicial order, is a positive duty. A duty to abstain from killing, from taking the goods of another without his consent, or from



entering his land without his license, is a negative duty.

423. I observe that forbearances have been styled by Mr. Bentham \* negative services. But the expression seems hardly authorized by established language. If you abstain from knocking me on the head, or from taking my purse, or from blackening my reputation, it can scarcely be said with propriety that "you render me a service." Bentham seems to have transferred to the object of a duty, an expression which applies correctly to the duty itself. For we may properly speak of a negative duty.

424. Duties may also be distinguished into relative and absolute.

425. A relative duty is incumbent upon one party, and answers to a right residing in another party. Where a duty is absolute, there is no right to which it answers. The definition of the latter is thus merely negative, and hence the full explanation of absolute duties is inevitably postponed to the explanation of rights, and the duties which answer to rights.

426. Since rights reside in persons, and since persons, things, acts, and forbearances are the subjects or objects of rights, I must advert to the respective significations of these various related expressions, before I address myself to rights, and to the obligations to which they answer.

427. Persons are divisible into two classes:—physical or natural persons, and legal or fictitious persons. The expression "physical" or "natural" is here used merely to distinguish persons, properly so called, from persons which are such by a figment. When I speak of "persons" simply, I mean physical or natural persons.

428. By a physical or natural person, or by a person

\* *Traité de Législation*, I. p. 154.

simply I mean homo, or a man, in the largest signification of the term: that is to say, as including every being which can be deemed human. This is the meaning which is given to the term person, in familiar discourse. And this, I believe, is the meaning which is given to it by the Roman Lawyers (from whose writings it has been borrowed by modern jurists) when they denote by it a physical or natural person, and not a legal or fictitious one.

429. Many of the modern Civilians have narrowed this simple import of the term person.

430. They define a person thus: "homo, cum statu suo consideratus;" \* "a human being, invested with a condition or status." And, in this definition, they use the term status in a restricted sense: As including only those conditions which comprise rights; and as excluding conditions which are purely onerous or burdensome, or which consist of duties merely.

431. Agreeably to this definition, as so understood by them, a person is a human being invested with, or capable of rights.

432. But this I am convinced was not the notion attached to the term, "person" by the Roman Lawyers themselves, when they denoted by it a physical or natural person.

433. For not only is status in many passages of the classical jurists ascribed to slaves, but in all their divisions of persons slaves are considered as persons. The words "persona" and "homo" are, moreover, used by Gaius as well as in various passages of the Institutes and Digest of Justinian as synonymous expressions. "Summa divisio de jure personarum, hæc est: quod omnes homines aut liberi sunt aut servi." Again: "Sequitur de jure personarum alia divisio. Nam quædam personæ sui juris

\* Heineccii Recitationes, lib. I. tit. 3.

sunt ; quædam alieno juri subjectæ. Sed rursus earum personarum quæ alieno juri subjectæ sunt, aliæ in potestate, aliæ in manu, aliæ in mancipio sunt. Videamus nunc de iis quæ alieno juri subjectæ sunt : Ac prius dispiciamus de iis qui in aliena potestate sunt. In potestate itaque sunt servi dominorum.”\* Now, down to the time of the Antonines, slaves had no rights ; and although under certain constitutions of these emperors they enjoyed some degree of protection against the violence of their masters, there is no trace of that circumstance having been adverted to by the institutional writers when they classed slaves amongst persons. Homo and persona are in the above passages applied indifferently, and it is clear that the word persons, as well in these as in many other passages which might be cited, is used in the familiar or vulgar sense, as denoting any human being.

434. The modern limitation of the term “ person ” to “ human beings considered as invested with rights,” appears to have arisen thus : 1st, A person was defined by many of the modern Civilians (although there is no classical authority for the definition), as “ a human being bearing a status or condition.” 2ndly, The authors of the definition used the term “ status ” in a peculiar and narrow sense. They assumed that every status comprises rights, or, at least, capacities to acquire or take rights ; whereas, as I shall more fully show in the sequel, status was applied by the Roman lawyers to various conditions of persons considered merely with regard to their incapacities.

435. The truth appears to be that the authors of the definition considered the term “ status ” as equivalent to the term “ caput : ” a word denoting conditions of a particular class ; conditions which do comprise rights, and comprise rights so numerous and important, that the

\* Gaii Institutionum Comment., Lib. I., § 9, 48-52.

conditions or status of which those rights are constituent parts, are marked and distinguished by a name importing pre-eminence.

436. I am, therefore, justified by authority, as well as by the convenience which results from it, in imputing to the term person (as denoting a physical or natural person) the familiar or vulgar meaning ;—namely, as equivalent to homo, or “man” in the largest signification of the term.

437. But, instead of denoting a man (or human being), person sometimes denotes the condition or status with which a man is invested. And taking the term in this signification, every human being who has rights and duties bears a number of persons. “Unus homo sustinet plures personas.” For example, every human being who has rights and duties, is citizen or foreigner ; that is to say, he is either a member of a given independent society, or he is not a member of that given independent society. He is also a son. Probably, he is husband and father. It may happen, moreover, that he is guardian or tutor. His profession or calling may give him distinctive rights, or may subject him to distinctive duties. And with the various conditions or status of citizen, son, husband, father, guardian, or tutor, he may combine the condition of judge, or of member of the supreme legislature, and so on to infinity.

438. The term “person,” as denoting a condition or status, is therefore equivalent to character. It signified originally, a mask worn by a player, to mark the character which he bore in the piece ; and is transferred by a metaphor to the character itself. By a further metaphor it is transferred from dramatic character to legal condition. For men as subjects of law are distinguished by conditions, just as players by the characters which they present. By the Greek commentators and translators,

the equivalent for *persona* is *πρόσωπον*, which correctly renders both the original and the metaphorical meaning.

439. Fictitious or legal persons are of three kinds : 1st, Some are collections or aggregates of physical persons : 2ndly, others are things in the proper signification of the term : 3rdly, others are collections or aggregates of rights and duties. The *collegia* of the Roman Law, and the corporations aggregate of the English, are instances of the first ; the *prædium dominans* and *serviens* of the Roman Law, is an instance of the second ; the *hæreditas jacens* of the Roman Law, is an instance of the third.

440. The nature of legal persons is various, and the ideas for which they stand extremely complex. They are persons by a figment, and for the sake of brevity in discourse. By ascribing rights and duties to feigned persons, instead of the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them.

441. To take the easiest instance ;—the *prædium dominans* and *serviens* of the Roman Law. A *servitus* or easement over one *prædium* resides in every person who occupies another *prædium* : meaning by a *prædium* a given piece of land, or a given building with the land on which it is erected. The servitude or easement in question (as, for instance, a right of way) is ascribed, by a fiction, to one of these *prædia* ; and, by a similar fiction, a duty to bear the exercise of the servitude is imputed to the other. The first is styled *dominans* ; the latter *serviens*. In English Law we should say that the easement (*i. e.*, the *jus servitutis*) is appurtenant to lands or messuages. In truth, the right resides in every physical person who successively owns or occupies the *prædium* styled *dominans* ; and avails against every physical person who successively owns or occupies the *prædium* styled *serviens*. But by imputing these rights and obligations to the *prædia*

themselves, and by talking of them as if they were persons, we express the rights and duties of the persons who are really concerned, with greater conciseness.

442. To take another instance. *Hæreditas jacens* was a term employed in the Roman Law to denote the whole of the rights and obligations which, at any instant of time during the period which intervenes between the death of the testator or intestate, and the heir's acceptance of the inheritance, would have devolved upon an heir at that instant entering upon the inheritance. This mass of rights and obligations was by a fiction styled a person, and this fiction was a convenient way of expressing that any benefit accruing to the inheritance during the above period, would inure to the benefit of the heir.

443. As intimately concerning persons I shall here interpose a remark on the meaning of liberty.

444. Freedom, Liberty, are terms denoting the absence of restraint. Civil, Political, or Legal Liberty, is the absence of legal restraint, whether such restraint has never been imposed, or, having been imposed, has been withdrawn.

445. Liberty and Right are synonymous; since the liberty of acting according to one's will would be altogether illusory if it were not protected from obstruction. There is however this difference between the terms. In Liberty, the prominent or leading idea is, the absence of legal restraint: whilst the security or protection for the enjoyment of that liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of Restraint.

446. If the protection afforded by the Law be considered as afforded against private persons, the word Right is commonly employed. If against the Government, or rather against some member of the Govern-

ment, Liberty is more frequently used: *e. g.*, the Liberties of Englishmen. Liberty and Right are not however always coextensive, since the security for the enjoyment of the former may in part be left to the moral and religious sanctions.

447. (Sed quære.) Whether Liberty can ever mean anything but the right to dispose of one's person at pleasure? Liberty or Freedom to deal with an external subject seems, however, to be equivalent to "Right to deal with it." In this sense liberty is included in the term "personal security."

448. On the whole, Right and Liberty seem to be synonymous:—either of them meaning, 1st, permission on the part of the Sovereign to dispose of one's person or of any external subject (subject to restrictions, of course); 2ndly, security against others for the exercise of such right and liberty.

449. Where protection is afforded, Right is the proper word. As against the sovereign, there can be no legal right.

450. Physical freedom is the absence of external obstacles; *i. e.*, the absence of causes which operate independently of the will. Moral freedom is the absence of motives of the painful sort.

## LECTURE XIII.

### *Things and their relation to Rights.*

451. HAVING considered the import of person, I proceed to the significations of Thing, Act and Forbearance.

452. Things are such permanent objects, not being persons, as are sensible, or perceptible through the senses. Such, for example, is a field, a house, a horse, a

garment, a piece of coined gold. Such is a quantity of coined or uncoined gold, determined or ascertained by number or weight. Such is a quantity of cloth, corn, or wine, determined or ascertained by measure.

453. Things are opposed, on the one hand, to persons: and, on the other, to the acts of the persons, and to facts or events.

454. Things resemble persons in this: That they are permanent objects which are perceptible through the senses. They differ from persons in this: That persons are invested with rights and subject to obligations, or, at least, are capable of both: Things are essentially incapable of rights or obligations; although (by a fiction) they are sometimes considered as persons, and rights or obligations are ascribed or imputed to them accordingly.

455. They differ from facts or events in this: That things are permanent external objects; whilst facts or events are transient objects. In drawing the line I am far from aspiring to exactness of definition. If I endeavored to define exactly the meaning of "permanent object," I should enter upon the perplexing question of sameness or identity. If I endeavored to define exactly the meaning of "sensible object," I should enter upon the interminable question about the difference between mind and matter, or percipient and perceived. And, in either case, I should thrust a treatise upon Intellectual Philosophy into a series of discourses upon Jurisprudence. I have accordingly indicated rather than determined the boundary, and must leave my hearers to settle it for themselves, according to their own fashion. The discretion which prompts my reserve will be understood by those who have turned a portion of their attention to the Philosophy of the Human Mind, and will meet with approbation rather than censure.

But to avoid a very perplexing ambiguity, I must



note two distinct significations of "permanent" and "transient."

456. The expression "permanent," when applied to a sensible object in the sense already employed imports that the object so described is perceptible repeatedly, and is considered by those who repeatedly perceive it, as being one and the same object. Thus, the horse or the house of to-day is the horse or house of yesterday; in spite of the intervening changes which its appearance may have undergone.

457. The transient sensible objects which rank with facts or events, are not perceptible repeatedly. They exist for a moment; disappear; and never recur to the sense, although they may be recalled by the memory. Taking the terms in these significations, all things are permanent, and no things are transient.

458. But taking the terms in other significations, things may be distinguished into permanent and transient, or into such as are more permanent and such as are less permanent. For some are more enduring; others are less enduring. Some retain the forms which give them their actual names for a longer, others for a shorter period.

459. The purpose of this last distinction will appear clearly when I consider the kinds and sorts into which things are divisible; especially the kind of things which have been styled fungible, and the sort of fungible things *quæ usu consumuntur*.

460. Resuming the definition of a thing, I mean by a thing (as contradistinguished from an event) any permanent external object not a person—meaning by "permanent," "capable of being perceived repeatedly."

461. From the import of the term thing (in the strict sense of the word and as opposed to person and event) I proceed to certain other meanings of the term, which, unless distinguished are apt to perplex the student.

462. And first "res" (or thing) as used by the Roman Lawyers is frequently extended from things strictly so called, to acts and forbearances considered as the objects of duties and of the corresponding rights. For example: If you are bound by virtue of a contract to do or to forbear from certain acts, the acts or forbearances to which you are obliged, and to which the opposite party has a corresponding right, are res or things in this extended sense of the word.

463. A more remarkable and a more perplexing use of the term is the following.

464. Things are divided by the Roman Lawyers into corporeal and incorporeal.

465. By "Corporeal" things (*res corporales*), they understood, according to the philosophical jargon which they borrowed from the Greeks, "Tangible" things (*res quæ tangi possunt*), meaning by "tangible," sensible or perceptible through the senses. For in the language of the Stoics and also of the Epicureans the various sensations were considered as modifications of the sensation of touch.\*

Under corporeal things are included,

466. 1. Things strictly so called: that is to say, permanent external objects not persons. 2. Persons considered as the subjects of rights and duties residing in, or incumbent upon others. 3. Acts and Forbearances, considered as the objects of rights and obligations. To forbearances, indeed, the term *res corporales* will not apply strictly, but it is extended to them partly for con-

\* "*Pondus uti saxi, calor ignibus, liquor aquai  
Tactus corporibus cunctis, intactus Inani.*"

"*Tactus enim, Tactus, proh Divum numina sancta!  
Corporis est sensus, vel cum res externa sese  
Insinuat, vel cum lædit, quæ in corpore nata est.*"

Lucretius, Lib. I. & II.

venience and partly, because the acts to be forborne are perceptible by the senses.

467. By "incorporeal things," they understood rights and obligations themselves: "Ea quæ in jure consistunt:" velut "jus hereditatis," "jus utendi fruendi," "jus servitutis," "obligationes, quoquo modo contractæ."

468. In the language then of the Roman Lawyers, the term *res* has two significations which are widely different. 1. It denotes Things, Acts, and Forbearances, and sometimes Persons, considered as the subjects or objects of rights and obligations. 2. It denotes not only these, but Rights and Obligations themselves. In this larger sense the word in fact embraces the whole matter with which laws are conversant.

469. In the English Law we have this same jargon about "incorporeal things" (derived from the Stoical Philosophy through the Roman Law), applied less extensively. With us, all rights and obligations are not incorporeal things; but certain rights are styled incorporeal hereditaments, and are opposed by that name to hereditaments corporeal. That is to say, rights of certain kinds are absurdly opposed to the things (strictly so called) which are the objects of rights of other kinds. A corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right, but the right itself. The subject of the right called an incorporeal hereditament is often corporeal, *e. g.*, the produce which is the subject of the right of tithe.

470. I observed in my last Lecture, that the slave is styled by the Roman Lawyers a "person." But considered as the subject of the dominion which resides in the master (a right which the master can assert against the rest of the world), he was sometimes styled a thing. For example: If unjustly detained by a third party, the

master might recover him by that peculiar action which is styled *rei vindicatio*. Their application of the word *res* in this sense was capricious. For the action styled *rei vindicatio* could not be brought by the father for the purpose of recovering his son, although the *patria potestas* (or right of the father in the son) was closely analogous to the dominion of the master. If the slave considered as the object of rights be termed a thing, there is no reason why any person considered from a similar point of view should not be so termed.

471. There are, however, very few cases in which the slave is styled a thing (even when he is considered as the subject of the master's dominion). Generally speaking, he is styled *homo*, or *servilis persona* (even when considered under that aspect): For instance, when he is considered as the subject of the ancient and formal conveyance called *mancipatio* (Gaius, I. § § 119, 120).

472. Having made these general remarks on the import of the term "thing," and attempted to explain the distinction between things corporeal and things incorporeal, I will pass in review certain other divisions between things, which are made in the Roman and English law.

473. Permanent sensible objects which are not persons are divided into things movable and things immovable.

474. Physically, Movable things are such as can be moved from the places which they presently occupy, without an essential change in their actual natures.

475. Physically, Immovable things are such as can not be moved from their present places; or can not be moved from their present places without an essential change in their actual natures. A field is an example of the first. A house, a growing tree, or growing corn, is an example of the second.

476. But things which are physically movable may be considered in law immovable by reason of their intrinsic

character and use, as the key of a door, or any essential part of a fixed machine.

477. Sometimes also by reason of a design or intention extrinsic to their proper character or use; *e. g.*, by the doctrines of English Equity, money directed to be laid out in land, will, during the subsistence of the trust, descend like land to the heir.

478. Another division of sensible permanent things is into things determined specifically or individually, and things which are merely determined by the classes to which they belong: *e. g.*, the field called Blackacre, or a field. This or that horse, or a horse. A bushel of corn, a yard of cloth, a pound of gold, a given number of guineas; or the bushel of corn contained in such a bag, or the yard of cloth or the pound of gold bearing such a mark, or the ten specific guineas now in your purse.

479. In the language of the Roman Lawyers, a thing individually determined is styled "*species*." A thing which is merely determined by the class to which it belongs, is styled "*genus*." Sometimes, *genus* signifies the class of things, and the indeterminate individual belonging to the determined class is styled "*quantitas*," though the term *quantitas* is often limited to indeterminate things of determinate classes, such as *mensura*, *numero*, *vel pondere constant*: As, to a bushel of corn, a pound of gold, and so on. The thing is determined by mensuration as well as by kind, although it is not determined specifically or individually.

480. The terms *species* and *genus*, in the language of jurisprudence, have therefore a meaning different from that which they bear in the language of logicians. In the language of logicians, a *genus* is a larger class, and a *species* is a narrower class contained by the *genus*. As animals are a *genus*, men are a *species* of animals.

481. In the language of jurisprudence, *genus* denotes

a class (whether it be a genus or species in the language of logicians), or it denotes an individual or portion not specifically determined, belonging to a determined class. Hence the expression, "specific legacy, specific performance."

482. Allied to the distinction between species and genus, or species and quantitas, is the distinction of things into fungible and not fungible.

483. Where a thing which is the subject of an obligation; *i. e.*, which one man is bound or obliged to deliver to another, must be delivered in specie, the thing is not fungible: *i. e.*, that very individual thing, and not another thing of the same or another class, in lieu of it, must be delivered.

484. Where the subject of the obligation is a thing of a given class, the thing is said to be fungible: *i. e.*, the delivery of any object which answers to the generic description will satisfy the terms of the obligation. "In genere suo functionem recipiunt:" meaning that the obligation is performed by the delivery of genus or quantitas: "Una fungitur vice alterius." In the language of the German jurists, fungible things are styled "vertretbar"—representable; a thing whose place may be supplied by another.

485. Things are fungible or not fungible, not in their own nature, but with reference to the terms of the given obligation. Fungible things are often confounded with things quæ usu consumuntur because these, for obvious reasons, are usually sold in genere, not in specie. But these things may be the objects of a specific obligation. I may be bound to deliver to you, not only so much wine, but that specific parcel of it now lying in my cellar, and in such a corner of it. Again, things which are not consumed by use may be the object of a generic obligation. A farm, a house, might for instance, be devised

generically, though in English law the bequest would probably be void for uncertainty. But in the writings of the Roman lawyers there are actual instances of facts of the kind.

486. This distinction is of considerable importance in practice with reference to performance in specie or recovery in specie. Almost the only ground for enforcing specific performance is, that nothing else can completely supply the place of that very thing for which the party contracted. Where it can, there is no reason for enforcing the contract in specie.

487. In English Equity, a specific delivery is, generally speaking, not enforced unless the subject of the contract is land: although contracts to deliver movable objects have been specifically enforced, because the objects were of so peculiar a nature that they could not be replaced. Such was the case of the Pusey horn, an object so specific and so completely *sui generis*, that the party never could have replaced it. Neither is specific delivery enforced by our Common Law, although by the C. L. P. Act 1854, § 78, a discretion is given to the judge to enforce specific delivery in an action for the wrongful detention of a chattel.

488. Things were divided in Roman Law into *res mancipi* and *res nec mancipi*. This distinction turns on forms of conveyance. *Res mancipi* were things which could only be aliened by a certain mode of conveyance. If they were not conveyed by the prescribed form, the party could only acquire them by usucapion, working on his actual possession. The mere conveyance imparted no interest to him.

489. Things are again divided into *res singulæ* and *universitates rerum*; things which are themselves individual and single, and can not be divided without completely destroying their actual nature, and lots or collections of

individual things. A sheep belongs to the first class, a flock of sheep to the second. This is not a distinction without a difference. If a man contracts to deliver so many sheep, and if he contracts to deliver a flock consisting of that number of sheep, his legal position is not the same in the two cases. If some of the sheep die in the interval, he must yet, in the first case, deliver the stipulated number; in the second, he need not, because you bought them in the gross.\*

490. The chief reason for defining and distinguishing things in the law, or in the expositions of it, is in order that dispositions of things and contracts relating to them may be facilitated; and that parties may know the effect of using such and such expressions in contracts and conveyances. It is important that the meaning of such terms as *mesuage*, for instance, should be practically settled, in order that the import of the words used in a contract, for example, may be exactly known. There are several cases in our law books turning on that very question. What does a party dispose of, by disposing of his furniture, or by disposing of all his effects? These are questions which the law must determine: that is, the law must determine the meaning it will attach to the words if the parties have not explained clearly the meaning which they annex to them; so that a person may know what construction the Courts of Justice will put upon those names.

491. In our conveyances, we make up for the indefin-

\* Intermediate between the two cases is a contract such as the sale of cotton to arrive, according to the usage of the Liverpool market, at that stage of the transaction where the bales have been invoiced, but not weighed over. It is a sale of specific bales with an implied engagement to replace any that may be lost or damaged with others of the quality specified. The precise nature of the contract becomes important when a question arises as to *periculum rei venditæ*. In the contract here instanced it appears to be the understanding of the market that the risk is transferred on the bales respectively being weighed over or "passing the scale." And this understanding (being proved) has been held to constitute a valid custom of trade, and to be imported into the contract accordingly.—R. C.



iteness of the general description, by attaching to the term which ought to convey the whole meaning a list of as many of the parts which fall under it as we can think of; a sort of drag net, to comprehend everything which happened to be omitted out of the comprehension of the one general name. This would be avoided if the exact import of those single names were specially determined by the legislator.

492. I take this occasion of recalling to your attention the double meaning of *persona* in the Roman law as signifying, sometimes a physical or real person, and sometimes a status or condition; for the purpose of observing that the last acceptance of *persona*, combined with that of *res* as denoting in certain cases rights and obligations, throws considerable light on the celebrated distinction between *jus rerum* and *jus personarum*; phrases which have been translated so absurdly by Blackstone and others—rights of persons and rights of things. *Jus personarum* did not mean law of persons or rights of persons, but law of status or condition. A person is here not a physical or individual person, but the status or condition with which he is invested. Gaius, when purporting to give the title or heading of this part of the law, has entitled it thus, “*De conditione hominum*,” and Theophilus, in translating the Institutes of Justinian from Latin into Greek, has translated *jus personarum*—*ἡ τῶν προσώπων διαίρεσις*—*Divisio personarum*; understanding evidently by *persona* or *πρόσωπον* not an individual or physical person, but the status, condition, or character borne by physical persons. The law of persons, as thus understood, is the law of status or condition; the law of things is the law of rights and obligations, considered in a general manner and as distinguished from those peculiar collections of rights and obligations which are styled conditions, and considered apart.

493. From the same ambiguity arose the mistake of supposing that *jura in rem* must have something to do with things; whereas the phrase really denotes rights which avail generally as distinguished from those which avail only against some determinate individual.

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## LECTURE XIV.

*Act and Forbearance. Jus in rem—in personam.*

494. In the two preceding Lectures I entered upon the analysis of the term "Right;" and considered the term "person" and the term "thing," in their primary and strict import, as well as in certain secondary meanings which have been assigned to them by writers on jurisprudence. I also adverted to the terms "Act" and "Forbearance." In the present Lecture I shall further define "Act" and "Forbearance," and shall consider briefly an important distinction which obtains between rights themselves—a distinction of which we must seize the general scope or import, before we can understand, and can express adequately and correctly, that nature or essence which is common to all rights.

495. Reverting to the strict import of the terms person and thing; persons and things may be distinguished from other objects; in the following manner:—1st. Each is an object perceptible by sense: 2ndly. is capable of being perceived repeatedly: and 3rdly. is considered by him who repeatedly perceives it as being, on those several occasions, one and the same object.

496. Events may be distinguished from persons and things in the following manner.

497. 1. Not every event is a sensible object. Of

events, some are perceptible by sense; but some are determinations of the will, or phases of mental activity which are not immediately perceptible to the senses of persons other than the individual whose will or mind is conceived of as in operation.

498. 2. An event perceptible by sense (like every other event) is transient. That is to say, not perceptible repeatedly. It exists for a moment; then ceases to exist; and never recurs to the sense, although the memory may recall it.

Events are simple or complex. A simple event is one which is considered incapable of analysis. A complex event is a number of simple events, marked (for the sake of brevity) by a collective name.

499. The terms "fact" and "incident" are sometimes synonymous with the term "event." But, not unfrequently, "fact" is restricted to human acts and forbearances, and "incident" employed in a sense to which I shall advert hereafter. "Fact" and "incident" are therefore ambiguous. To denote the objects I am now distinguishing from "person" and "thing," I prefer the term "event," which is adequate and unambiguous.

500. The class of events to which I particularly advert at present, are human acts and forbearances.

501. Bentham has distinguished acts into internal and external,\* meaning by "internal acts," determinations

\* "In the second place, acts may be distinguished into external and internal. By external are meant corporal acts; acts of the body: by internal mental acts; acts of the mind: Thus, to strike is an external or exterior act: to intend to strike, an internal or interior one."—Bentham, *Principles*, &c., p. 70.

I have followed the author's final decision in rejecting Bentham's extended use of the term "acts." I must, however, remark that if the author intends to exclude from the category of acts all processes that do not immediately result in a palpable bodily movement, he is inconsistent.

The author elsewhere (p. 222, *post*) implicitly recognizes meditation as an act: Further (*ib.*), while he regards the conviction produced by evidence as a case of physical compulsion, he recognizes that non-belief may be blameable, if the result of insufficient examination, refusal to examine, &c. The

of the will. Rejecting this distinction as superfluous, I employ the term "determination of the will" as sufficient to denote the class of objects called by Bentham "internal acts," and use the word "acts" to denote only such motions of the body as are consequent upon determinations of the will.

502. A Forbearance is the not doing some given external act, and not the doing it in consequence of a determination of the will. The import of the term is, therefore, double. As denoting the determination of the will, its import is positive. As denoting the inaction which is consequent upon that determination, its import is negative.

503. This double import should be marked and remembered. For mere inaction imports much less than forbearance or abstinence from action.

504. And here I dismiss for the present the terms "Act" and "Forbearance." It already appears that a complete determination of their meaning involves a determination of the meaning of "Will." I accordingly postpone further consideration of these terms until I have considered the meaning of "Will" and of the inseparably connected term, "Intention."

505. I now proceed to analyze an important distinction which obtains between rights, and which, for reasons to be presently adduced, I mark by the phrases "rights in rem," "rights in personam."

506. But I must interpose an explanation of certain terms, which I have already employed and shall again

process of examination is therefore the object of a duty, and hence, according to his own analysis, it is an act.

It is difficult to see why *cogito* should not be classed with acts, just as much as *curro* or *haurio*. And such a use of the term act is not at variance with established language. The *consilium* or *cogitatio* has even been recognized by positive law as a crime, provided it is evidenced by an overt act, a term devised, as it appears to me, not without psychological insight (See p. 215, *post.*)—R. C.

have occasion to employ, and which have an important bearing on the distinction to be here analyzed.

507. I have already (p. 240 ante) spoken of acts and forbearances as the object of duties, and I have spoken of persons and shall also speak of things as the subjects of rights and duties. When I style acts and forbearances the objects of duties, or of the rights (if any) which answer to those duties, I mean that the duties are imposed upon the persons obliged in order that they may act or forbear in the manner specified. When I style persons or things the subjects of rights, I mean that the acts or forbearances which are the objects of those rights relate to those persons or things; and I employ the expression only in regard to those rights which avail against persons generally; *e.g.* when I speak of the right of the master in or to his servant, the object of the right is the forbearance, at the hands of all other persons, from so meddling with the servant as to prejudice the master's enjoyment of his services. Here I call the servant the subject of the right. It is to be observed, as I shall show hereafter, that this right is entirely distinct and separate from the master's right as against the servant—the right, namely, which answers to the duty of the servant to do and forbear according to his contract. So when I speak of the right of property in a horse or in a field, I call that horse or that field the subject of the right.\*

508. I must also interpose one explanation further. When I say that a right avails against a person or persons, what I mean is this. Every right resides in a person or persons, and has for its object one or more acts or forbearances at the hands of another or other persons.

\* It may be noted that the author in using the word subject in this sense, advisedly differs from the German jurists, who commonly call the person in whom the right resides, the subject of the right. The author elsewhere suggests (p. 737 of larger edition) that this use of the word subject led them into the confusion mentioned in a former note (p. 118 *supra*); fancying that it was connected with the use of the term subjective in the Kantian philosophy.—R. C.

To express shortly the last part of this proposition, I say that the right avails against the person or persons last mentioned.

509. I proceed to distinguish "rights in rem" from "rights in personam," which I do shortly as follows:—

510. *Definition.*—Rights IN REM are those which avail against persons generally: rights IN PERSONAM are those which avail exclusively against certain or determinate persons.

511. This distinction is one which pervades the writings of the Roman lawyers; and is assumed by the Roman Institutional critics as the main groundwork of their arrangement. Nevertheless, the terms "jus in rem—jus in personam," are not explicitly adopted by these writers to indicate the distinction. These terms were devised by the Civilians who wrote subsequently to what has been termed the revival of the study of Roman Law, and I adopt them as the terms which most adequately and least ambiguously express the distinction.\* "Jus in personam certam sive determinatam," is expressive and free from ambiguity. Cut down to "jus in personam" it is also sufficiently concise. "Jus in rem," standing by itself, is ambiguous and obscure. But when it is contradistinguished to jus in personam, it catches a borrowed clearness from the expression to which it is opposed.

512. And here I must make a remark as to what jus in rem does not mean. Recurring to the phrase I have already used in styling persons and things the subjects of rights; that phrase might be varied by saying that the right exists over, in, or to a thing. And, as I have already indicated, I employ these expressions only in the case of rights which avail against persons generally.†

\* The terms which were employed by the Roman lawyers themselves, with various other names for the classes of rights in question, will be found briefly stated in a note at the end of this lecture.—R. C.

† I have here, although Austin does not explicitly so state it, treated the

The student might be apt to infer that *jus in rem* means a right over, in, or to a thing. He would be wrong. I do not say that the ideas are historically unconnected; but however that may be, the phrase *in rem* as here used, denotes not the subject but the compass of the right. It denotes that the right in question avails against persons generally; and not that the right in question is a right over a thing. For many of the rights which are rights in *rem* are either rights over or to persons, or have no subject (person or thing).

513. *Corollary to definition.*—These two classes of rights are further distinguishable thus. The duties which correlate with rights in *rem*, are always negative: that is to say, they are duties to forbear or abstain.\* Of the obligations which correlate with rights in *personam*, some are negative, but some (and most) are positive; that is to say, obligations to do or perform.

514. I shall now briefly give a few instances to illustrate the character of the rights comprised in these two great classes respectively.

515. Instances of rights in *rem* are, 1. Ownership or property. This is a term of such complex or various meaning that I must defer the full and accurate explanation of it. But, for the present purpose, the following is a sufficient definition of Ownership or Property: "the right

restriction of the phrase "right over a person or thing" to those rights which avail against persons generally, as perfectly arbitrary. The reason for so restricting the expression appears to be that it is convenient to divide rights in *rem* into those which have and those which have not persons or things as subjects, whereas there is no corresponding convenience in so dividing rights in *personam*. But there seems no necessary ground for the restriction. Suppose, for instance, I am in possession of a piece of ground with a merely equitable title. Why should my right against persons generally to forbear from trespass, be more a right over or in the land, than my right to compel the person having the legal estate to grant a conveyance?—R. C.

\* This indeed is almost a necessary consequence of the definition. For if rights of the class *jus in rem* involved positive duties every such duty would either set the whole world in motion, or involve universal liability to punishment; a result which it would be absurd to contemplate.—R. C.

to use or deal with some given subject, in a manner, or to an extent, which, though not unlimited, is indefinite."

516. Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right. That is to say, all other persons are bound to forbear from acts which would prevent or hinder the enjoyment or exercise of the right.

517. But here the duties which correspond to the right of property terminate. Every positive duty which may happen to concern or regard it, and every negative duty regarding it which binds exclusively certain persons, is not a duty properly corresponding to the right of property, but to some right collateral to the right of property, and flowing from some incident specially binding the person upon whom the duty is incumbent; *e.g.* from a covenant with the owner; or from a breach of one of the negative duties which properly correspond to the right of property, as a trespass laying the trespasser under the duty to make reparation.

518. Ownership or Property is, therefore, a species of *jus in rem*. It is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. The obligations implied by it are also negative as well as universal.

519. Where the subject of a right in *rem* happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) over or to the subject as against other persons generally. He has also rights (in *personam*) against the subject, or lies under obligations (in the sense of the Roman lawyers) towards the subject. I shall revert to this matter.

520. 2. The Servitudes of the Roman law, and of the various modern systems which are modifications of the Roman law, may also be abducted as examples of rights in *rem*.

521. *Servitus* (for which the English "Easement" is



hardly an adequate expression) is a right to use or deal with, in a given and definite manner, a subject owned by another. Take, for instance, a Right of Way over another's land. According to this definition, the capital difference between ownership and servitus consists in this, that in the former case the right of dealing with the subject is larger and indeed indefinite, in the latter case narrower and determinate. But each is a right in rem. For servitus avails against all mankind (including the owner of the subject). It implies an obligation upon all (the owner again included) to forbear from every act inconsistent with the exercise of the right.

522. But this negative and universal duty, is the only obligation which correlates with the *jus servitutis*. Every special obligation which happens to regard or concern it is a duty answering, not to the *jus servitutis*, but to some right extraneous or merely collateral to it; *e.g.* the owner of the subject may have granted an easement over it and covenanted with the grantee for quiet enjoyment. The grantor here lies under two duties which are completely distinct and disparate, although the objects of the duties are the same; one of these duties arises from the grant, and thereby he is bound, like the rest of the world, to forbear from molesting the grantee in exercise of the right created by the grant; the other arises from the contract by which he is specially bound.

523. Instances of rights in personam are:—

524. I. A right arising from a contract.

Rights which, properly speaking, arise from contracts avail against the parties who bind themselves by contract, and also against the parties who are said to represent their persons; that is to say, who succeed on certain events to the aggregate or bulk of their rights; and therefore, to their faculties or means of fulfilling or liquidating their obligations. But as against all other persons

the rights which properly speaking arise from contracts have no force or effect; although by a confusion of thought to which I shall revert, rights in rem are sometimes imagined to proceed from contract. This occurs in the case where the same transaction bears the double character of a contract and a conveyance. To avoid in the meantime the effect of this confusion, I assume, in the following example, that we are considering the case on the principles of the Roman law or of some system of law consciously based on the Roman law.

525. Suppose you contract with me to deliver some movable (a horse, a garment, or what not); but, instead of delivering it to me, in pursuance of the contract, that you sell and deliver it to another. Now, here, the rights which I acquire by virtue of the Contract or Agreement are the following: I have a right to the movable in question, as against you specially (*jus ad rem acquirendam*). So long as the ownership and the possession continue to reside in you, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction, in case you detain it. After the delivery to the buyer, I can compel you to make me satisfaction for your breach of the contract with me. But here my rights end. As against strangers to that contract, I have no right whatever to the movable in question. And, by consequence, I can neither compel the buyer to yield it to me, nor force him to make me satisfaction as detaining a thing of mine. For "*obligationum substantia non in eo consistit ut aliquod nostrum faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum.*" (See the admirable Title in the Digests, "*De Obligationibus et Actionibus*," xliv. 7.) But if you deliver the movable in pursuance with your agreement with me, my position towards other persons generally assumes a different

aspect. In consequence of the Delivery by you and the concurring Apprehension by me, the thing becomes mine. I have now *jus in rem*: a right to the thing delivered, as against all mankind; a right answering to obligations negative and universal. And, by consequence, I can compel the restitution of the subject from any who may take and detain it, or can force him to make me satisfaction as for an injury to my right of ownership.

· *Ubi rem meam invenio, ibi eam vindico; sive cum ea persona negotium mihi fuerit, sive non fuerit. Contra, si a bibliopola librum emi, isque eum nondum mihi traditum vendiderit iterum Sempronio, ego sane contra Sempronium agere nequeo; quia cum eo nullum mihi unquam intercessit negotium: sed agere debeo adversus bibliopolam a quo emi; quia ago ex contractu, i.e. ex jure ad rem.*" Heineccii Recitationes, lib. ii. tit. I. § 331.

526. 2. Rights of action, with all other rights founded upon injuries, are also *jura in personam*. For they answer to obligations attaching upon the determinate persons, from whom the injuries have proceeded, or from whom they are apprehended.

527. It is true that difficulties have arisen about the nature of Actions in *rem*; *i.e.* those Actions (or rather those Rights of Action) of which the ground is an offense against a right in *rem*, and of which the intention (scope, or purpose) is the restitution of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this; that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and confounded by expositors of the Roman Law. And this confusion of ideas absolutely disparate and distinct, seems to have arisen from the abridged shape of the expressions by which rights of action are commonly de-

noted. By an ellipsis commodious and inviting, but leading to confusion and obscurity, a name or phrase applicable to the violated right is often extended improperly to the remedy. Thus, the phrase "in rem" is extended to certain actions, which, though they are necessarily directed against determinate persons are grounded upon violations of rights availing against all mankind. And, thus, certain actions are styled "ex contractu," although they properly arise from the non-performance of contracts, and are only remote and incidental consequences of the contracts themselves.\*

528. All rights in personam are rights to acts and forbearances and to nothing more. The species of rights which have been termed *jus ad rem* form no exception. What has been styled *jus ad rem* is an elliptical expression, and is more properly rendered *jus ad rem acquirendam*, or still more completely, *jus in personam ad jus in rem acquirendum*. That is to say, the person entitled has a right, availing against a determinate person, to the acquisition of a right availing against the world at large. And by consequence, his right is a right to an act of conveyance or transfer on the part or the person obliged.

529. I now revert to the confusion created by a class of cases which obscure the otherwise broad and distinct line of demarcation between these two great classes of

\* I have taken this passage from the Notes on Tables (p. 969 of former edition), where the author's meaning seems more fully expressed than in the corresponding passage of the lectures. But I think the author here inverts the historical sequence of ideas. He has himself observed that the phrase *in rem* is not applied by the Roman lawyers themselves to describe a class of rights. But it is applied by them to a leading division of actions. The simple and obvious explanation seems to be that the phrase was suggested by the circumstance that in the typical and most important of these actions, the *vindicatio rei*, the result was the specific restitution of the thing. The meaning of *in rem* as denoting generality of a right, is, I think a secondary meaning due in the first place, to the association of the *vindicatio rei* with *dominium*—the right which gave rise to that action—and in the second place, to the extension of the term *dominium* to that large sense which includes the whole class of rights comprehended by the civilians under the term *jus in rem*.—R. C.

rights. Rights in rem sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract: the instrument in these cases wears a double aspect, or has a twofold effect; to one purpose it gives jus in personam and is a contract, to another purpose it gives jus in rem and is a conveyance. When a so-called contract passes an estate, or, in the language of the civilians, a right in rem, to the obligor, it is to that extent not a contract but a conveyance; although it may be a contract to some other extent and considered from some other aspect.

530. For example, by the English law the sale of a specific movable is a conveyance, and transfers the right in rem. [But from the exigencies of commerce this right in rem is, shorn of some of the incidents of a full right of property, for instance, by the operation of the rules both of law and equity as to the rights of unpaid vendors; the Bills of Sale Act; the "reputed ownership" clauses of the Bankrupt Acts: all of which are clumsy expedients for obtaining the results which naturally flow from the simple principle of the Roman law and the systems consciously based on that law, namely, "*Traditionibus non nudis pactis dominia rerum transferuntur.*"—R. C.]\*

\* It is curious to observe the approximation in practical effect of the mercantile laws of two countries which start with opposite theories. The approximation has been slightly aided in England and Scotland by the Mercantile Law Amendment Acts, for the respective countries (1856).

By the law of England, the right of the buyer of a specific movable not delivered is jus in rem. It is available against everybody except:

1. The unpaid vendor (in security for his payment).

2. The creditors of the vendor, where personal chattels not being goods sold in the ordinary course of trade, are sold under a bill of sale not duly registered under the Bills of Sale Act.

3. The trustee in Bankruptcy of the vendor in certain cases falling under the "reputed ownership" clause of the Bankrupt Act.

By the law of Scotland, the right of the buyer is jus in personam and avails against:

1. The vendor (subject to the condition of payment).

2. By the Mercantile Law Amendment Act, it avails to a sub-vendor against the original vendor.

3. By the same Act, it avails against the creditors of the vendor, except in certain cases to which the common law of Scotland applies the doctrine of reputed ownership.

R. C.

531. In the French law, a contract for the sale of an immovable is of itself a conveyance; there is no other; the contract, or agreement to sell, is registered, and the ownership of the immovable at once passes to the buyer.

532. By the provisions of that part of the English law which is called equity, a contract to sell an immovable at once vests *jus in rem* or ownership in the buyer, and the seller has only *jus in re aliena*. But according to the conflicting provisions of that part of the English system peculiarly called law, a sale and purchase without certain formalities merely gives *jus ad rem* or a right to receive the ownership, not ownership itself; and for this reason a contract to sell, though in equity it confers ownership, is yet an imperfect conveyance in consequence of the conflicting pretensions of law.\* To complete the transaction the buyer has a right in *personam* against the seller, to compel him to pass his legal interest.

\* It should here be observed, however, that the owner of what is called the equitable estate can not even in equity recover against a purchaser for value, having no notice of his equitable title, who has got the legal estate; "legal estate" in this instance expressing not merely the estate according to law as distinguished from equity, but being an expression loosely used to express the fiction more properly denoted by the word *seisin* (or, in rights not capable of *seisin*, the completion of title in a mode analogous to *seisin*). If *seisin* were public in fact as it is in theory, a purchaser of land might rely upon the register, if the expedient were adopted (as it is in Scotland) of making registration the only mode of transferring the *seisin*. The principle which in England secures "the purchaser for value, without notice of an adverse title, who has got the legal estate," is the one piece of solid ground in English title. If registration were made, by statute, the only mode of transferring the legal estate, and no notice were allowed to affect a purchaser, other than should appear on the face of the registered title, or by the actual state of possession, and if every transfer of the legal estate gave the transferee a power of sale for all the estate and interest of the transferor, titles would in time become more secure and much more simple.

The above paragraph was in type before I had read the 7th Section of the Act passed last session under the innocent title of the Vendor and Purchaser Act, 1874: nor can I now guess what will be the practical effect of this curiously enacted fragment of an abortive Land Titles Bill. — R. C.

## NOTE.

*On the different terms used by Jurists to mark the Capital Distinction between Rights introduced in the above Lecture.*

533. One of the great desiderata in the language of jurisprudence is this: A pair of opposed expressions denoting briefly and unambiguously the two classes of rights which are the subject of the present note: namely, Rights availing against persons generally or universally, and Rights availing against persons certain or determinate.

534. The opposed or contrasted expressions commonly employed for the purpose, are the following: "jus in re" — "jus ad rem:" "jus in rem" — "jus in personam:" "jus reale" — "jus personale:" "dominium" (sensu latiore) — "obligatio." But these are liable to the general objection that jus in re, jus in rem, jus reale and dominium, will none of them denote, without a degree of ambiguity, the entire class of rights which avail against the world at large. For although they are often employed in that extensive signification, they commonly signify such of those rights as are rights to determinate things.

Besides this general objection, each of these pairs of terms is liable to special objections, which now I will briefly indicate. In the course of this review, certain terms, synonymous with the terms in question, will be noticed with the same brevity. At the close, I will shortly state my reasons for giving a decided preference to "jus in rem" and "jus in personam."

535. 1. "Jus in re" and "Jus ad rem."—Jus ad rem frequently signifies any right which avails against a person certain. Still it is often and properly restricted to a

species of such rights; to those which correlate with obligations "ad dandum aliquid;" or is properly speaking, *jus in personam* ad *jus in rem* acquirendum. It is, therefore, ambiguous.

This double meaning of *jus ad rem* is closely connected with a confusion of thought, which, as I shall show afterwards, has an important bearing upon certain mistakes in the French and Prussian Codes (see Lect. xxxix, post). The confusion arose in this way. In numerous cases of transactions which have their origin in contact, the acquisition of a *jus in rem* is preceded by *jus ad rem* in the restricted sense of the term above mentioned. The way in which this occurs is illustrated by the example given on p. 256 *supra*. Observing that this sequence took place in certain transactions which are striking by their frequency and importance, Heineccius and other Civilians by a hasty generalization fell into the following errors: 1st. They inferred that every acquisition of *jus in rem* is preceded by *jus ad rem*, and by a correlating or corresponding obligation. This invariable sequence they marked in the following manner:—To the fact or incident imparting the *jus in rem* they gave the name of "*modus acquirendi*," or "*modus acquisitionis*." To the preceding incident imparting *jus ad rem* (which they considered a step or means to the acquisition of *jus in rem*) they gave the name of "*titulus ad acquirendum*," or briefly "*titulus*." For example: According to their language, a contract to deliver a thing is "*titulus ad acquirendum (jus in rem)*:" The delivery or tradition which follows it, or by which it ought to be followed, is "*modus (jus in rem) acquirendi*," or "*modus acquisitionis*." 2ndly. From this first error they fell into a second. Perceiving that *jus ad rem*, in the restricted and proper sense above mentioned, is the forerunner of the incident by which *jus in rem* is acquired, and confounding the proper sense of



*jus ad rem* with the largest sense of the expression as extending to every *jus in personam*, they supposed that every incident which imparts *jus in personam*, is merely "*titulus ad (jus in rem) acquirendum*," that is merely preparatory to a "*modus acquisitionis*" or to the incident imparting the *jus in rem*.

Heineccius further expresses the supposed invariable sequence by calling the "*titulus*" the remote cause, and the "*modus*" the proximate cause of the consequent right (*jus in rem*). The authors of the French Code crown this confusion of thought by speaking of property as acquired and transmitted (amongst other ways) "*par l'effet des obligations*." Art. 711.

536. 2. "*Jus reale*" and "*Jus personale*."—These are used to denote the distinction in question. But they tend to create confusion:—

First, because they might lead to confusion of thought by suggesting that the distinction had something to do with the widely different distinction—*jus rerum*, *jus personarum*—which belongs to a division not of rights, but of the whole *corpus juris*.

Secondly, because it would be apt to suggest to a student of English law the different distinction of rights into real and personal, *i.e.* heritable and administrable.

Thirdly, because the words real and personal have been applied to servitudes to mark a widely different distinction, namely that between servitudes which are *appurtenant*, and those which are *in gross*.

537. 3. "*Dominium*" (*sensu latiore*) and "*Obligatio*." Besides the general objection which is mentioned above, *dominium* (as opposed to *obligatio*) differs from *dominium* (in the strict signification). As opposed to *obligatio*, it embraces "*jura in re*" (in the sense of the Classical Jurists); that is to say, "*jura in re aliena*;" rights or interests in subjects which are owned by others. Taken

in the strict signification, it is directly opposed to these rights; being synonymous with "*proprietas*," with "*in re potestas*," or with "*jus in re propria*." The numerous ambiguities which beset the term *obligatio* will be noted hereafter. In the meantime it may be observed that in the largest sense of the term, and that in which it is usually employed by the Roman lawyers, *obligatio* is equivalent to *jus in personam*. But it is used in so many narrower and restricted senses in modern systems of law, as to have become inconvenient as a technical term to denote the larger of rights in question.

538. 4. "*Potestas*" and "*Obligatio*."—It has been proposed to substitute these in the place of *dominium* and *obligatio*, *jus in rem* and *jus in personam*, etc. But this were a change to the worse. For, first, *potestas*, as synonymous with *dominium*, is encumbered with all the ambiguities which stick to the latter. And, secondly, it is liable to an objection from which the latter is free. For it usually signifies certain species of the rights which avail against persons determinate: namely, the rights of the master against the slave ("*potestas dominorum in servos*"); and the rights of the *paterfamilias* against his descendants ("*patria potestas*," or "*potestas parentum in liberos*").

539. 5. "*Absolute rights*" and "*Relative rights*."—These expressions as thus applied, are flatly absurd. For rights of both classes are relative; or, in other words, rights of both classes correlate with duties or obligations. The only difference is, that the former correlate with duties which are incumbent upon the world at large; the latter correlate with obligations which are limited to determined individuals.

540. 6. "*Jura quæ valent in personas generatim*," and "*Jura quæ valent in personas certas sive determinatas*" —These expressions are sufficiently clear and precise.

But they are rather definitions than names, and are much too long for ordinary use.

541. 7. "Law of Property" and "Law of Contract."—These expressions, as thus opposed, are intended to express the distinction which is the subject of the present note. But they do the business wretchedly. Of the numerous objections which immediately present themselves, I will briefly advert to the following:

First, we need contrasted expressions for the two classes of rights, and not for the laws or rules of which those rights are the creatures.

Secondly, property is liable to the objection which applies to dominium. In this instance, its meaning is generic. It signifies rights of every description which avail against the world at large. But, in other instances, it distinguishes some species of those rights from some other species of the same rights. For example: It signifies ownership, as opposed to servitude or easement; or it signifies ownership indefinite in point of duration, as opposed to an interest for a definite number of years. In short, if I traveled through all its meanings and attempted to fix them with precision, this brief notice would swell to a long dissertation.

Thirdly, contract is not a name for a class of rights, but for a class of the facts or titles by which rights are generated.

Fourthly, rights arising from contracts are only a portion of the rights, which the expression "law of contract" is intended to indicate. For "law of contract," as opposed to "law of property," denotes, or should denote, rights in personam certam: a class which embraces rights not arising from contracts, as well as the species of rights which emanate from those sources.

542. 8. "Jus in rem" and "Jus in personam."—The phrase "in rem" is an expression of frequent occurrence

in the writings of the Roman Lawyers. And although it is nowhere used by them for the purpose of signifying briefly and unambiguously rights of every description which avail against persons generally, yet in all the instances in which it occurs, the subject to which it is applied is a something which avails generally: "*quod generatim in causam aliquam valet.*"

The expression *jus in rem* was devised by the Glossators, or by the Commenators who succeeded them. Seeing that the phrase "*in rem*" always imported generality, and feeling the need of a term for "rights which avail generally," they applied the former to the purpose of marking the latter, and talked of "*JURA in rem.*" And in this instance, as in many others, they evince a strength of discrimination, and a compass of thought which are rarely displayed by the elegant and fastidious scholars who scorn them as scholastic barbarians. In spite of the ignorance to which their position condemned them, their reason was sharpened and invigorated by the prevalent study of their age; by that school logic which the shallow and the flippant despise, but which all who examine it closely, and are capable of seizing its purpose, regard with intense admiration.

Now the expression *jus in rem*, in this its analogical meaning, perfectly supplies the desideratum which is stated above. For as "*in rem*" denotes generality, "*JUS in rem*" should signify rights availing against persons generally. Therefore, it should signify all rights belonging to that genus, let their specific differences be what they may. And that is the thing which is wanted.

543. If it were possible for me to fix the meaning of words, I should distinguish the two classes of rights and obligations in the following manner.

1°. Obligations considered universally, I would style "*Offices,*" or "*Duties.*"

2°. Rights which avail against persons generally or universally, I would style "Rights in rem."

3°. Rights which avail against persons certain or determinate, I would style "Rights in personam."

4°. Obligations which are incumbent upon persons generally or universally, I would style "Offices" or "Duties."

5°. To those which are incumbent upon persons certain or determinate, I would appropriate the term "Obligations."

Without introducing a single new term, and without employing an old one in a new manner, we should thus be provided with language passably expressive and distinct; which would enable the writer or speaker to move onward, without pausing at every second step to clear his path of ambiguities. All that is necessary to this desirable end, is to use established terms in established meanings, taking good care to use them determinately: *i.e.* to restrict each term to its appropriate object.

## LECTURE XV.

### *Jus in rem—in personam (continued).*

544. In order that I may further illustrate the import of the leading distinction between rights introduced in my last Lecture, I shall direct your attention to those rights in rem which are rights over persons, and to certain rights in rem, or availing against the world at large, which have no determinate subjects (persons or things).

Of rights existing over persons, and availing against other persons generally, I may cite the following as examples:—The right of the father to the custody and education of the child:—the right of the guardian to

the custody and education of the ward:—the right of the master to the services of the slave or servant.

545. Against the child or ward, and against the slave or servant, these rights are rights in personam : that is to say, they are rights answering to obligations (in the sense of the Roman Lawyers) which are incumbent exclusively upon those determinate individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him as for a breach of the contract of hiring, or as for breach of an obligation (*QUASI ex contractu*) implied in the status of servant

But considered from another aspect, these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons generally, or against the world at large; and the duties to which they correspond, are invariably negative. As against other persons generally, they are not so much rights to the custody and education of the child, to the custody and education of the ward, and to the services of the slave or servant, as rights to the exercise of such rights without molestation by strangers. As against strangers, their substance consists of duties, incumbent upon strangers, to forbear or abstain from acts inconsistent with their scope or purpose.

In case the child (or ward) be detained from the father (or guardian), the latter can recover him from the stranger. In case the child be beaten, or otherwise harmed injuriously, the father has an action against the wrong-

doer for the wrong against his interest in the child ; and so on.

546. And here I may remark conveniently, that where a right in rem is a right over or to a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds. He is merely the subject of the real right, and occupies a position analogous to that of a thing which is the subject of a similar right.

547. For example, Independently of his rights against the child, and independently of his obligations towards the child, the parent has a right in the child availing against the world at large.—Independently of his rights against the parent, and independently of his obligations towards the parent, the child has a right in the parent availing against the world at large. The murder of the parent by a third person might not only be treated as a crime, or public wrong, but might also be treated as a civil injury against that right in the parent which belongs to the child. By the laws of modern Europe, the civil injury merges in the crime ; but in other ages the case was different ; the offender lay under a twofold obligation : to suffer punishment on the part of the society or community, and to satisfy the parties whose interest in the deceased he had destroyed. Before the abolition of Appeals in criminal cases,\* this was nearly the case in the law of England. The murderer was obnoxious to punishment to be inflicted on the part of the State ; and the wife and the heir of the slain were entitled to vindictive satisfaction, which they exacted or remitted at their pleasure. And this is the distinction, and the only one, which exists between a civil injury and a crime.†

\* By the 59 Geo. III., ch. 46.

† By the law of Scotland the wife and family of the slain have still the right to bring a civil action for assythment (the ground of action being not only indemnification for damage, but also solatium for the bereavement)

548. Now, considered as the subject of the real right which resides in the parent, the child is placed in a position analogous to that of a thing, and might be styled (in respect of that analogy) a thing; and so vice versa. In short, whoever is the subject of a right which resides in another person, and which avails or obtains against a third person or persons, is placed in a position analogous to that of a thing, and might be styled (in respect of that analogy) a thing.

549. But this analogical application of the term thing has (in fact) been partial and capricious. So far as I can remember there are only two instances in which the term thing has been applied to persons, considered as the subjects of rights.—By the Roman lawyers, the slave, considered as the subject of the real right which resides in the master, was occasionally ranked with things.—By certain modern Civilians (Heineccius and others) the *filiusfamilias*, considered as the subject of the real right which resides in the *paterfamilias*, has been classed with things.

550. It has been commonly supposed that the slave was not considered by the Roman Lawyers as belonging to the class of persons. But this is one of those assumptions utterly destitute of foundation, which have been successively received by successive generations, though the means of disproof are open and obvious to all. Considered as bound by duties towards his master and others, the slave is ranked by the Roman Lawyers with physical persons; and is spoken of as bearing, or sustaining, a person, status, or condition. Considered as the subject of the right residing in his master and availing (not

notwithstanding a criminal prosecution instituted by the Public Prosecutor, unless capital punishment be suffered. It is the Scotch action of *assythment* which suggested to Lord Campbell the introduction into England of a law for compensating the families of persons killed by accidents, by the Act 9 and 10 Vict., ch. 93, commonly called Lord Campbell's Act.



against himself, but against third persons), he is occasionally styled *res*. But, even as considered from this aspect, he is usually deemed a person rather than a thing, and is styled usually *servilis persona*. Gaius, for instance, in describing mancipation, which is a particular form of conveyance, and enumerating the subjects which may be conveyed by it, says, *Eo modo et serviles et liberæ personæ mancipantur*. The right of the master to the services of the slave is distinguished by a different name from that which expresses the analogous right in a thing. It is called *potestas*, or *potestas domini in servum*, not *dominium*.

551. As for the *filiusfamilias*, I am not aware of any passage in the classical jurists where he is styled a thing. In the passage of the Digest where the action called *rei vindicatio* is said to be applicable to the recovery of a slave, the same action is denied to be applicable to a *filiusfamilias*. *Per hanc autem actionem, liberæ personæ quæ sunt juris nostri, ut puta liberi qui sunt in potestate, non petuntur*. The right of the father over his son is never styled *dominium* or *proprietas*, but *patria potestas*, or *potestas patris in liberos*.

552. Having cited examples of real rights which are rights over persons, I will cite an example or two, of real rights, which are not rights over things or persons, but are rights to forbearances merely.

553. 1. A man's right or interest in his good-name is a right which avails against persons, considered generally; they are bound to forbear from such imputations against him as would amount to injuries towards his right in his reputation. It is therefore a right in *rem*. But there is no subject, thing or person, over which it can be said to exist.

554. 2. A monopoly, or the right of selling exclusively commodities of a given class (a patent right for instance),

is also a real right: All persons, other than the party in whom the right resides, are bound to forbear from selling commodities of the given class or description. But, though the right is a real right, there is no subject, person, or thing, over which it can be said to exist, unless it be the future profits, above the average rate, which he may possibly derive from his exclusive right to sell.

555. 3. Many examples of this class of rights might be selected from among franchises; a law term embracing an immense variety of rights, having no common property whatever except their supposed origin, being all of them considered to have been originally granted by the Crown. Such, for example, is a right of exclusive jurisdiction in a given territory, or a right of levying a toll at a certain bridge or ferry. The rights in personam which concur with the rights in question (*e.g.* the rights answering to the obligations on the persons who happen to traverse the bridge) are perfectly distinct from the rights in rem of which the franchise consists: namely, the obligation not to impede the exercise of the jurisdiction, the levying of the toll, or the passage over the bridge; nor to carry passengers across within the limits of the ferry, to the detriment of the exclusive right of the person entitled.

556. 4. The right of the heir to the heritage. According to the Roman Law the heir had, as distinguished from the several rights which devolve upon him from the testator or intestate, a right in the aggregate formed by those several rights coupled with the obligations of the deceased. In this heritage, so far as it consisted of rights, the heir had by the Roman law a right, availing against the world at large, and which he could maintain against any one who might gainsay or dispute it by a peculiar judicial proceeding called *petitio hereditatis*,

which was an action in rem, *i.e.* grounded on an injury to a real right, and seeking the restoration of the injured party to the unmolested exercise of the right in which he had been disturbed.

557. 5. Lastly, a right in a Status or condition (considered as an aggregate of rights and capacities) is also a real right. To determine precisely what a Status is, is in my opinion the most difficult problem in the whole science of jurisprudence. But for the purpose immediately before me, it may suffice to say that it consists of an aggregate of rights, duties, and capacities, or of one or more of those classes of objects. So far as a condition consists of rights, and of capacities to take rights, we may imagine a right in the condition considered as a complex whole.

558. According to the Roman Law, as the heir has a right in the heritage (abstracted from its several parts), so has the party invested with a condition, a right or interest in the condition itself (abstracted from the rights and capacities of which it is compounded). His right in the condition, considered as an aggregate or whole, is analogous to the right of ownership in a single or individual thing.

559. Consequently, wrongs against this right are analogous to wrongs against ownership; and, according to the practice of the Roman Law, wrongs of both classes are redressed by similar remedies. Where the individual thing is unlawfully detained from the owner, he may vindicate or recover the thing. And where the right in the condition is wrongfully disputed, the party may assert his right by an appropriate action, which is deemed and styled a vindication.

560. The reason why status or condition makes so little figure in the English law as compared with the Roman, though the idea must of course exist in all

systems of law, seems to be this: that the right in a status may by the Roman law be asserted directly and explicitly by an action expressly for its recovery; while in English law (if we except certain actions peculiar to the Court for Divorce and Matrimonial causes)\* no such action can be brought, and the right to a status, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode, incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of status, is usually brought in and decided upon incidentally, in an action of ejectment. The question whether or not a particular person is a slave, would generally come before the judge upon a prosecution by the slave of the person claiming to be his master for doing some act which would be illegal unless the claim could be established. The only case in which a question of status is decided directly in English law, is when a jury is summoned to try that precise question as an issue incidental to a suit in another court.

\* Declaratory actions negative of status have long been known in the old Ecclesiastical and modern Divorce Courts in England. Instances are the action of Nullity of Marriage, and of Jactitation of Marriage (more expressively in Scotland called "Putting to Silence"). The comparatively recent introduction by "the Legitimacy Declaration Act, 1858," of an action to establish a status of Legitimacy is an anomaly. The Attorney-General is made a party, apparently in the character of *advocatus diaboli*. One would suppose that the framers of the statute originally entertained the idea that the decree pronounced in the action should be conclusive against persons in general. If so, that intention was abandoned before the bill became an act. For the statute (as passed) contains the very reasonable proviso that the judgment or decree in the action shall not prejudice persons who neither were parties nor claim through others who were parties to the action. It may be here observed as a principle of general jurisprudence that a judgment or decree in an action of status (like every other judgment or decree) is conclusive only between the parties to the action in which it is pronounced, and persons in privity with them. The Roman *actio in rem* was no exception to this principle, although if the defendant was in possession (which he probably was) the decree, by enforcing specific restitution, gave the plaintiff the advantage of that possession, and consequently gave him the advantage of being the defendant in any action which another claimant might bring.—R. C.

## LECTURE XVI.

*Rights considered generally.*

561. In the present Lecture, I shall endeavor to settle the import of the term "right" considered as an expression embracing all rights.

To accomplish this purpose I shall proceed in the following order :

562. 1. I shall endeavor to state, in general expressions, the nature, essence, or properties, common to all rights.

563. 2. I shall examine certain definitions of the term "right;" and I shall endeavor to elucidate the common nature of rights, by showing the vices or defects of those definitions.

Every right is a right in rem, or a right in personam.

564. The essentials of a right in rem are these :

It resides in a determinate person, or in determinate persons, and avails against other persons universally or generally. Further, the duty with which it correlates, or to which it corresponds, is negative ; that is to say, a duty to forbear or abstain. Consequently, all rights in rem reside in determinate persons, and are rights to forbearances on the part of persons generally.

565. The essentials of a right in personam are these :

It resides in a determinate person or persons and avails against a person or persons certain or determinate. Further, the obligation with which it correlates is negative or positive ; that is to say, an obligation to forbear or abstain, or an obligation to do or perform.

It follows from this analysis, first, That all rights reside in determinate persons. Secondly, That all rights correspond to duties or obligations incumbent upon other

persons ; that is to say, upon persons distinct from those in whom the rights reside. Thirdly, That all rights are rights to forbearances or acts on the part of the persons who are bound.

These (I believe) are the only properties wherein all rights resemble or agree.

566. Consequently, Right considered in abstract (or apart from the kinds and sorts into which rights are divisible) may be conceived and described generally in the following manner.

567. A monarch or sovereign body expressly or tacitly commands that one or more of its subjects shall do or forbear from acts towards or in respect of a distinct and determinate party. The person or persons who are to do or forbear from these acts are said to be subject to a duty, or to lie under a duty. The person towards whom those acts are to be done or forborne, is said to have a right, or to be invested with a right.

568. Consequently, the term "right" and the term "relative duty" (see p. 230 *supra*) signify the same notion considered from different aspects. Every right supposes distinct parties : A party commanded by the sovereign to do or to forbear, and a party towards whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a duty ; that is to say a relative duty. The party towards whom he is commanded to do or to forbear, is said to have a right to the acts or forbearances in question.

569. I now proceed to examine certain definitions which have been given of the term right.

570. 1. A right has been defined by certain writers, as that security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others.

571. 2. It has also been said that rights are powers: powers over, or powers to deal with, things or persons.

572. Objections: 1st, all rights are not powers over things or persons. All (or most) of the rights which I style rights in personam are merely rights to acts or forbearances. And many of the rights which I style jura in rem have no subjects (persons or things). 2ndly. What is meant by saying that a right is a power? The party invested with a right is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the state.

573. It may indeed, be said, that a man has a power over a thing or person, when he can deal with it according to his pleasure, free from obstacles opposed by others. Now, in consequence of the duties imposed upon others, he is thus able. And, in that sense, a right may be styled a power. But, even in this sense, the definition will only apply to certain rights to forbearances. In the case of a right to an act, the party entitled has not always (or often) a power.

574. 3. *Facultas faciendi* (aut non faciendi). This definition is open to the same objections as the last definition. "*Facultas*," what?

575. 4. Right;—the capacity or power of exacting from another or others acts or forbearances. This nearly approaches a true definition. It falls short of it however in this respect, that the means of exacting the act or forbearances, namely, through the sanction enforced by the state, is not expressly adverted to.

576. My definition briefly is this:—A party has a right, when another or others are bound or obliged by the law, to do or to forbear, towards or in regard of him.

But, as I stated at the outset of the analysis, the full import of the term "right" can not be made to appear till all the related expressions are examined.

## LECTURE XVII.

### *Absolute and relative duties.*

577. As I intimated at the outset of the analysis through which I am now journeying, duties may be distinguished into relative and absolute. I then observed (p. 231), that the full explanation of the latter and negative term must be postponed to an explanation of rights, and the duties which answer to rights. Having attempted to explain these, I now proceed to the duties which have no corresponding rights, or which (in a word) are absolute.

578. Every legal duty (like every legal right) emanates from the command of a sovereign. And the party upon whom it is imposed is said to be legally obliged, because he is liable to the means of compulsion wielded by that superior.

579. Every duty is a duty to do or forbear. A duty is relative, or answers to a right, where the sovereign commands that the acts shall be done or forborne towards a determinate party, other than the obliged. All other duties are absolute.

580. Consequently, a duty is absolute in any of the following cases: 1st, where it is commanded that the acts shall be done or foreborne towards, or in respect of, the party to whom the command is directed; or where, in other words, the duty is self-regarding. 2ndly. Where it is commanded that the acts shall be done or forborne towards or in respect of parties other than the obliged but who are not determinate persons. physical or ficti-



tious. For example, towards the members generally of the given independent society; or towards mankind at large. 3rdly. Where the duty imposed is not a duty towards man; or where the acts and forbearances commanded by the sovereign, are not to be done or observed towards a person or persons. 4thly, Where the duty is merely to be observed towards the sovereign imposing it; *i.e.* the monarch, or the sovereign number in its collegiate and sovereign capacity.

I shall consider these duties in the order which I have now announced.

581. But before I endeavor to explain and exemplify the classes of absolute duties, I will briefly advert to a topic upon which I may insist hereafter.

582. In styling some of these duties self-regarding, and in affirming of others of these duties "that they are not duties towards man," I look exclusively at their immediate or proximate scope.

583. Considered with reference to their more remote purposes, they are absolute duties regarding persons generally. For, assuming that they are imposed at the suggestion of general utility, they regard the members generally of the given political society.

584. For example, the duty incumbent upon you to forbear from suicide, is a self-regarding duty, in respect of its proximate purpose—to the end of deterring you from destroying your own life. But, remotely or indirectly, it is an absolute duty regarding persons generally. For it is partly imposed for the purposes of preserving a member to the community, and of deterring its members generally from the act of suicide.

585. Again: A duty to forbear from cruelty towards the lower animals, is not a duty towards man in respect of its proximate scope. Its proximate or direct scope is to save the lower animals from needless suffering.

But in respect of its remote purposes, the duty is an absolute duty regarding persons indefinitely. For, tending to preserve and cherish the sentiment of benevolence or sympathy, it tends to the good of the community, and to the good of mankind at large.

586. The same remark applies to relative duties as well as to absolute duties of the kinds immediately above mentioned.

In numerous instances, rights are conferred (and their correlating duties imposed) with the direct or immediate purpose of promoting the general good (as, for example, the rights of judges and other political subordinates); and rights are conferred indirectly to the same extensive purpose, although their proximate end be the advantage of the parties entitled, or of other determinate parties for whom they are conferred in trust. For instance, the right of property,—whether the proprietor is simply owner, or is a trustee for other determinate persons who have what is called the beneficial interest.

587. In order that we may conceive correctly many important distinctions, it is necessary that we should conceive precisely the truths which I have now stated.

For example, the Roman Lawyers, and most writers upon Jurisprudence, divide Law into Public and Private. According to the Roman Lawyers, Public Law is that, "*quod ad publice utilia spectat.*" Private Law is that department of the whole, "*quod ad singulorum utilitatem—ad privatim utilia—spectat.*"

But this, it is manifest, is not the ground of the intended distinction. For since the general interest is an aggregate of individual interests, Law regarding the former, and Law regarding the latter, regard the same subject. In other words, the terms "public" and "private" may be applied indifferently to all Law.

588. Briefly stated, the distinction between Public and

Private Law is this. The former regards persons as bearing political characters. The latter regards persons who have no political characters, and persons also who have them as bearing different characters. I shall endeavor hereafter to analyze the distinction (see Lect. XLIV., post).

589. Again: Civil Injuries and Crimes are distinguished by Blackstone and others in the following manner. Civil Injuries are private wrongs and concern individuals only. Crimes are public wrongs, and affect the whole community.

590. If Blackstone had but reflected on his own catalogue of crimes, he must have seen that this is not the basis of the capital distinction in question. Most crimes are violations of duties regarding determinate persons, and therefore affect individuals in a direct or proximate manner. Such, for instance, are offenses against life and body: murder, mayhem, battery, and the like. Such, too, are theft and other offenses against property.

But independently of this, Blackstone's statement of the distinction is utterly untenable.

591. All offenses affect the community, and all offenses affect individuals. But though all affect individuals, some are not offenses against rights, and are, therefore, of necessity, pursued directly by the Sovereign, or by some subordinate representing the Sovereign.

592. Where the offense is an offense against a right, it might be pursued (in all cases) either by the injured party, or by those who represent him. But, for reasons which I shall explain at large when I arrive at the distinction in question, it is often thought expedient that the pursuit of it should not be left to the discretion of the injured party or his representatives, but should be assumed by the Sovereign or by the subordinates of the

Sovereign. In this difference of procedure, and not in any distinction between the tendencies of the acts, lies the distinction between Crimes and Civil Injuries. An offense which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offense which is pursued by the Sovereign or by the subordinates of the Sovereign, is a crime.\*

593. In many cases (as in cases of Libels and Assaults) the same offense belongs to both classes. That is to say, the injured has a remedy which he applies or not as he likes, and the Sovereign reserves the power of visiting the offender with punishment.

594. It follows, that in distinguishing relative from absolute duties, and in distinguishing the kinds of the latter, we must not look to the ultimate scope or purpose with which duties are imposed. For, as that is the same in all cases, it can never enable us to draw the distinctions in question.

A relative duty corresponds, as I have said, to a right ; *i.e.* it is a duty to be fulfilled towards a determinate person or determinate persons, other than the obliged, and other than the Sovereign imposing the duty. All other duties are absolute.

All absolute obligations are enforced criminally ; they

\* It may be here observed that in Scotland and other countries where there is a Public Prosecutor charged with the investigation and prosecution of crimes and offenses, the distinction between crimes and offenses on the one hand, and civil injuries on the other, is much more intelligible than in the English system. For the distinction, such as it is, in English Law, does not arise until commitment for trial (vide Stephen's Criminal Law, p. 155). In Scotland the duty of investigation and prosecution, as well as the power of abandoning proceedings, from the time of the commission of the crime until sentence, lies with Her Majesty's Advocate, and his subordinates for whom he is responsible ; and there is further this distinction, that all criminal proceedings are either taken in, or are subject to review by the Court of Justiciary ; a court with a jurisdiction quite distinct from that of the Court of session, which is the proper tribunal in civil actions. This system has the advantage (among others), that the magistrate, who wields the power of the state for the protection, primarily, of the general community, can not be made a tool and dupe for mere private ends.—R. C.

do not correspond with rights in the Sovereign, the Public, etc.; nor with rights at all. But rights to enforce, exist in persons delegated by the Sovereign; *e.g.*, in England, offenses against absolute duties, like all other crimes, are said to be offenses against the King. By which is simply meant that it is part of his office to pursue those offenses as well as other crimes.

595. Absolute duties are distinguishable by their proximate or immediate purposes.

1. The proximate purpose of some is the advantage of the party obliged. And these I style self-regarding.

Examples of violations of these duties: Drunkenness.\* Suicide.† Breach of chastity, not accompanied by violation of a right residing in another, as by adultery, rape, seduction. (Rape includes injury to the party ravished, and to others who have an interest, &c.)

2. The proximate purpose of others is the advantage of persons indefinitely; for instance, of the community at large, or of mankind in general.

*Examples.*—The duty of military service, in most countries. The duty of all persons to shut a cattle-gate which opens from a railway, a duty imposed proximately for the safety of the public, although it indirectly concerns the Railway Company.

*Violations.*—Arson, or willful fire-raising, which is prohibited not so much on account of the damage to the individual owner of the property set fire to—for it is equally a crime if a man set fire to his own property—but on account of the danger to the public. Treason, which is properly an offense against the Sovereign; though an offense against a member of the sovereign body is often so considered.

3. The proximate purpose of others is not the advantage of any person or persons.

\* Blackstone, iv. 64.

† *Ibid.* 189.

Towards God: (Ascetic observances.) (Blackstone, vol. iv. p. 43.)

Towards the lower animals.

The Deity, an infant, or one of the lower animals, as being the party towards whom a duty is to be performed, might be said to have a right. But so, in the same case, might an inanimate thing. To call the Deity a person, is absurd.\*

## LECTURE XVIII.

### *Will and Motive.*

596. Every legal duty is a duty to do (or forbear from) an outward act or acts, and flows from the command of the Sovereign.

To fulfill the duty which the command imposes, is just or right. That is to say, the party does the act, or the party observes the forbearance, which is *jussum* or *directum* by the author of the command.†

To omit (or forbear from) the act which the command enjoins, or to do the act which the command prohibits, is a wrong or injury:—A term denoting (when taken in its largest signification) every act, forbearance, or omission,

\* For definition of "person" see Lect. XII., ante.—R. C.

† Just is that which is *jussum*; the past participle of *jubeo*.

Right is derived from *directum*; the past participle of *dirigo*; or, rather, right is probably derived from some Anglo-Saxon verb, which comes with *dirigo* from a common root. The German *recht*, *gerecht*, *richtig*, *rechtens* (just) is from the obsolete *richten* or *rechten* (*dirigo*). Hence *Richter*, a judge. Latin—*Rego*, *Rex*, *Regula*, *Rectum*. (Wrong = *Wrung*; the opposite of *rectum*.)

And as just and right signify that which is commanded, so do the Latin *Æquum* and the Greek *Dikaion* denote that which conforms to a law or rule. Manifestly, a metaphor borrowed from measures of length. Something equal to, or even with, a something to which it is compared. *Æquum* = *jus gentium*.

The abstracts, justice, or *justum*, *dikaion*, equity, &c., denote conformity to command; as their answering concretes denote a something which is commanded, or equal (see note p. 167, *supra*).

which amounts to disobedience of a Law (or of any other command) emanating directly or circuitously from a Monarch or Sovereign Number—"Generaliter injuria dicitur, omne quod non jure fit."

A party lying under a duty is liable to evil or inconvenience (to be inflicted by sovereign authority), if he disobeys the Command. This conditional evil is the Sanction which enforces the duty; and the party bound or obliged, is bound or obliged, because he is liable to this evil, if he disobeys the command. That bond, vinculum, or ligamen, which is of the essence of duty, is simply or merely, liability to a Sanction.

597. It follows from these considerations, that, before I can complete the analysis of legal right and duty, I must advert to the nature or essentials of legal Injuries, and of a legal or political Sanctions. As Person, Thing, Act, and Forbearance, are inseparably connected with the terms "Right" and "Duty," so are Injury and Sanction imported by the same expressions.

598. But before we can determine the import of "Injury" and "Sanction" (or can distinguish the compulsion or restraint which is implied in Duty or Obligation, from that compulsion or restraint which is merely physical), we must try to settle the meaning of the following perplexing terms: namely, Will, Motive, Intention, and Negligence;—including, in the term "Negligence," those modes of the corresponding complex notion, which are styled "Temerity" or "Rashness," and "Imprudence" or "Heedlessness."

Accordingly, I shall now endeavor to state or suggest the significations of "Motive" and "Will."

599. Nor is this incidental excursion into the Philosophy of Mind a wanton digression from the path which is marked out by my subject.

600. For 1, The party who lies under a duty is bound

or obliged by a sanction. This conditional evil determines or inclines his will to the act or forbearance enjoined. In other language, he wishes to avoid the evil impending from the Law, although he may be averse from the fulfillment of the duty which the Law imposes upon him. It is necessary therefore to clear the expressions "Motive" and "Will" from the obscurity with which they have been covered by philosophical and popular jargon.

601. 2, The objects of duties are acts and forbearances. But every act and every forbearance from an act, is the consequence of a volition, or of a determination of the will. We must try, therefore, to know the meaning of the term "Will."

602. 3, Some injuries are intentional. Others are consequences of negligence (in the large signification of the term). We must try, therefore, to determine the meaning of "Intention" and "Negligence."

It is absolutely necessary that the import of the last-mentioned expressions should be settled with an approach to precision. For both of them run, in a continued vein, through the doctrine of injuries or wrongs; and of the rights and obligations which are begotten by injuries or wrongs. And one of them (namely, "Intention"), meets us at every step, in every department of Jurisprudence.

But, in order that we may settle the import of the term "Intention," it is again necessary to settle the import of the term "Will." For, although an intention is not a volition, they are inseparably connected. And, since "Negligence" implies the absence of a due volition and intention, it is manifest that the explanation of that expression supposes the explanation of these.

603. Accordingly, I will now attempt to analyze the expressions "Will" and "Motive."



Certain parts of the human body obey the will. In other words, we have the power of moving, in certain ways, certain parts of our bodies.

These expressions, and others of the same import, merely signify this :

Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by an outward obstacle or hindrance. If my arm be free from disease, and from chains or other hindrances, my arm rises, so soon as I wish that it should. But if my arm be palsied, or fastened down to my side, my arm will not move although I desire to move it.

These antecedent wishes and these consequent movements are human volitions and acts (strictly and properly so called). They are the only objects to which those terms will strictly and properly apply.

But, besides the antecedent desire (which I style a volition), and the consequent movement (which I style an act), it is commonly supposed that there is a certain "Will," which is the cause or author of both. The desire is commonly called an act of the will; or is supposed to be an effect of a power or faculty of willing, supposed to reside in the man.

That this same "will" is simply nothing, has been proved (in my opinion) beyond controversy by the late Dr. Brown, who also expelled from the region of entities, those fancied beings called "powers," of which this imaginary "will" is one. This author, in his analysis of the relation of cause and effect, considered the subject from numerous aspects equally new and important; and was (I believe) the first who rightly explained what we mean when we talk about the Will, and the power or faculty of willing. When I speak of willing a movement

of my body, all that I mean (so far as I have an intelligible meaning) is that I wish the movement, that I expect the movement to follow my wish, and that it does follow accordingly.

For proof that nothing more is really meant, I must refer to Brown's "*Analysis of Cause and Effects.*"\* A detailed exposition of the subject would be inconsistent with the limits by which I am confined, and with the direct or appropriate purpose of these Lectures.

604. The wishes which are immediately followed by the bodily movements wished, are the only wishes immediately followed by their objects.

In every other instance of wish or desire, the object of the wish is attained (in case it be attained) through a mean; and (generally speaking) through a series of means—each of the means being (in its turn) the object of a distinct wish; and each of them being wished (in its turn) as a step to that object which is the end at which we aim.

For example: If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end.

605. It will be admitted by all (on the bare statement) that the dominion of the will is limited or restricted to some of our bodily organs. The motion of my heart, for instance, would not be immediately affected, by a wish I might happen to conceive that it should stop or quicken.

\* Brown's *Inquiry into the Relation of Cause and Effect.* (For the Will in particular, Part I, Section 3). Mill's *Analysis of the Phenomena of the Human Mind*, cap. 24, 25.

606. That the dominion of the will extends not to the mind, may appear (at first sight) somewhat disputable. It has, however, been proved by the writers to whom I have referred. Nor, indeed, was the proof difficult, so soon as a definite meaning had been attached to the term will. Here (as in most cases) the confusion arose from the indefiniteness of the language by which the subjects of the inquiry were denoted.

If volitions be nothing but wishes immediately followed by their objects, it is manifest that the mind is not obedient to the will. In other words, it will not change its actual, for different states or conditions, as (and so soon as) it is wished or desired that it should. Try to recall an absent thought, or to banish a present thought, and you will find that your desire is not immediately followed by the attainment of its object. It is, indeed, manifest that the attempt would imply an absurdity. Unless the thought desired be present to the mind already, there is no determinate object at which the desire aims, and which it can attain immediately, or without the intervention of a mean. And to desire the absence of a thought actually present to the mind, is to conceive the thought of which the absence is desired, and (by consequence) to perpetuate its presence.

Changes in the state of the mind, or in the state of the ideas and desires, are not to be attained immediately by desiring those changes, but through long and complex series of intervening means, beginning with desires which really are volitions.\*

607. Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled volitions.

\* Examples: Taking up a book to banish an importunate thought. Looking into a book to recover an absent thought.

608. And as these are the only volitions, so are the bodily movements, by which they are immediately followed, the only acts or actions properly so called.

609. The only difficulty with which the subject is beset, arises from the concise or abridged manner in which, generally speaking, we express the objects of our discourse.

Most of the names which seem to be names of acts, are names of acts coupled with certain of their consequences. For example: If I kill you with a gun or pistol, I shoot you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an act, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it at your head or body and pull the trigger. These I will. The contract of the flint and steel, the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are consequences of the act which I will. I will not those consequences, although I may intend them. But in common language the words will and intend are often confounded. To this subject I shall revert in the ensuing Lecture.

610. The desires of those bodily movements which immediately follow our desires of them, are imputed, as I have said, to an imaginary being, which is styled the Will. They have been called acts of the will. And this imaginary being is said to be determined to action, by Motives.

All which (translated into intelligible language) merely means this: I wish a certain object. That object is not attainable immediately, by the wish or desire itself. But it is attainable by means of bodily movements which

will immediately follow my desire of them. For the purpose of attaining that which I can not attain by a wish, I wish the movements which will immediately follow my wish, and through which I expect to attain the object which is the end of my desires (as in the foregoing instance of the book).

611. A motive, then, is a wish causing or preceding a volition—a wish for a something not to be attained by wishing it, but which the party believes he shall probably or certainly attain, by means of those wishes which are styled acts of the will.

612. In a certain sense, motives may precede motives as well as acts of the will. For the desired object which is said to determine the will may itself be desired as a mean to an ulterior purpose. In which case the desire of the object, which is the ultimate end, prompts the desire which immediately precedes the volition.

613. That the will should have attracted great attention is not wonderful. For by means of the bodily movements which are the objects of volitions, the business of our lives is carried on. That the will should have been thought to contain something extremely mysterious, is equally natural. For volitions (as we have seen) are the only desires which consummate themselves—the only desires which attain their objects without the intervention of means.

## LECTURE XIX.

### *Intention.*

614. To discard established terms, is seldom possible; and where it is possible, is seldom expedient. Instead of rejecting conventional terms, because they are ambiguous and obscure, we shall commonly find it better to

explain their meanings, or (in the language of old Hobbes) "to snuff them with distinctions and definitions," so as to give a better light.

Accordingly, I shall talk of "willing;" of "determinations of the will;" and of "motives determining the will." But all that I mean by those expressions is this: "To will" is to wish or desire certain of those bodily movements which immediately follow our desires of them. A "determination of the will," or a "volition," is a wish or desire of the sort. A "motive determining the will" is a wish not a volition, but suggesting a wish which is. The wish styled a "motive," is not immediately followed by its appropriate object; but the bodily movement which is the appropriate object of the volition, seems to the party a certain or probable mean for attaining the something which is the appropriate object of the motive. In case that something be wished as a mean to an ulterior object, the wish of the ulterior object is a motive to a motive; as the wish of the intervening mean is a motive to the volition.

**615.** The bodily movements which immediately follow our desires of them, are the only human acts, strictly and properly so called. For events which are not willed, are not acts; and the bodily movements in question are the only events which we will. They are the only objects which follow our desires, without the intervention of means.

But, as I observed in my last Lecture, most of the names which seem to be names of acts, are names of acts strictly and properly so called, coupled with more or fewer of their consequences.

And as the names of acts comprise certain of their consequences, so it is said that those consequences are willed, although they are only intended. In the case which I have just supposed, it would be said that I

willed the consequences of my voluntary muscular movements, as well as the movements themselves.

Nor is it practicable to discard these forms of speech, although they involve the nature of will and intention in thick obscurity. They are inseparably interwoven with the rest of established language; and, if I attempted to change them for new and precise expressions, I should either resort to terms which others would not understand, or to tedious circumlocutions which others would not endure. To analyze, mark, and remember their complex import, is all that I can accomplish.

Accordingly, I must often speak of "acts," when I mean "acts and their consequences;" and of those consequences as if they were willed, though in truth they are intended.

616. The bodily movements which immediately follow our desires of them, are acts (properly so called).

But every act is followed by consequences; and is also attended by concomitants, which are styled its circumstances.

To desire the act is to will it. To expect any of its consequences, is to intend those consequences.

The act itself is intended as well as willed. For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

617. And hence (no doubt) the frequent confusion of will and intention. Feeling that will implies intention, numerous writers upon Jurisprudence (and Mr. Bentham amongst the number) employ "will" and "intention" as synonymous or equivalent terms. They forget that intention does not imply will.

618. Now the consequence of an act is never willed. For none but acts themselves are the appropriate objects of volitions. Nor is it always intended. For the party

who wills the act, may not expect the consequence. If a consequence of the act be desired, it is probably intended. But, as I shall show immediately, an intended consequence is not always desired. Intentions, therefore, regard acts; or they regard the consequences of acts.

To show that the agent may not intend a consequence of his act, I will give an example:

Shooting with a pistol at a mark chalked upon a paling, one of my shots hits and wounds a person passing along a road at the other side of the fence.

Now, when I aim at the mark, and pull the trigger, I may not intend to hurt the passenger. For though the hurt of a passenger be a probable consequence, I may not think of it, or advert to it, as a consequence. Or, though I may advert to it, as a possible consequence, I may think that the fence will intercept the shot, and prevent it from passing to the road. Or the road may be one which is seldom traveled, and I may think the presence of a stranger at that place and time extremely improbable.

On any of these suppositions, I am clear of intending the harm: Though, as I shall show hereafter, I may be guilty of heedlessness or rashness. Before intention can be defined exactly, the import of those terms must be taken into consideration.

619. Where the agent intends a consequence of the act, he may wish the consequence, or he may not wish it.

And, if he wish the consequence, he may wish it as an end, or he may wish it as a mean to an end.

620. Strictly speaking, no external consequence of any act is desired as an end. For the end or ultimate purpose of every volition and act is a feeling or sentiment:—pleasure, direct or positive; or the pleasure which arises indirectly from the removal or prevention of pain. But where the pleasure, which, in strictness, is the end of



the act, can only be attained through a given external consequence, that external consequence is inseparable from the end; and is styled, with sufficient precision, the end of the act and the volition.

621. Where an intended consequence is wished as an end or a mean, motive and intention concur. In other words, The consequence intended is also wished; and the wish of that consequence suggests the volition. This possibly is the reason why motive is frequently confounded with intention by writers on jurisprudence. Of this confusion the law of England affords a flagrant instance when it lays down that murder must be committed of malice aforethought; by which is only meant that it must be committed intentionally. (see p. 304, *infra*).

622. I will now exemplify those three varieties of intention at which I have pointed already.

1. The agent may intend a consequence; and that consequence may be the end of his act,

2. He may intend a consequence; but he may desire that consequence as a mean to an end.

3. He may intend the consequence, without desiring it.

623. As examples of these three varieties, I will adduce three cases of intentional killing.

You hate me mortally; and, in order that you may appease that painful and importunate feeling, you shoot me dead.

Now here you intend my death; and, taking the word "end" in the meaning which I have just explained, my death is the end of the act, and of the volition which precedes the act. Nothing but that consequence would appease your hate or satisfy your malice.

624. Again:

You shoot me, that you may take my purse. I refuse

to deliver my purse when you demand it. I defend my purse to the best of my ability. And, in order that you may remove the obstacle which my resistance opposes to your purpose, you pull out a pistol and shoot me dead.

Now here you intend my death, and you also desire my death. But you desire it as a mean, and not as an end. Your desire of my death is not the ultimate motive suggesting the volition and the act. Your ultimate motive is your desire of my purse.

625. Lastly :

You shoot at Sempronius or Styles, at Titius or Nokes, desiring and intending to kill him. The death of Styles is the end of your volition and act. Your desire of his death, is the ultimate motive to the volition. You contemplate his death, as the probable consequence of the act.

But when you shoot at Styles, I am standing close by him. And you think it not unlikely that you may kill me in your attempt to kill him. You fire, and kill me accordingly. Now here you do not desire my death, neither as an end nor as a mean. But since you contemplate my death as a probable consequence of your act, you intend my death.

626. It follows from the nature of Volitions, that forbearances from acts are not willed, but intended.

When I forbear from an act (speaking generally) \* I

\* Not every present forbearance from a given act is preceded or accompanied by a present volition to do another act ; e.g. I may lie perfectly still, intending not to rise.

But it is generally true, that every present forbearance is preceded or accompanied by a volition. In our waking hours, our lives are a series (nearly unbroken) of volitions and acts. And, when we forbear, we commonly do a something inconsistent with the act forborne, and which we are conscious is inconsistent with it.

Where a forbearance is preceded or accompanied by inaction, the desire leading to the forbearance is not to be compared to a volition. The forbearance is not, like the act, the direct and appropriate object of the wish.

will. But I will an act other than that from which I forbear or abstain; and, knowing that the act which I will, excludes the act forborne, I intend the forbearance.

For example, It is my duty to come hither at seven o'clock. But, conscious that I ought to come hither, I go to the Playhouse at that hour, instead. Now, in this case, my absence from this room is intentional. I know that if my legs brought me to the University, they would not carry me to the Playhouse.

If I forgot that I ought to come hither, my absence would not be intentional, but the effect of negligence.

## LECTURE XX.

### *Negligence, Heedlessness, and Rashness.*

627. The motives to forbearances (or, rather, to the acts which exclude the acts forborne) are different in different cases.

I may forbear from the act because I dislike its consequences; or because I prefer the consequences of the act which I presently will, and which I could not perform unless I forbore from the other. In either case, the act which I will and not the forbearance, is the object of the volition itself. "To will nothing" is a flat contradiction in terms.

Forbearances must be distinguished from Omissions.

"To forbear," is not to do, with an intention of not doing.

"A forbearance," is a not doing, with a like intention.

"To omit," is not to do, but without thought of the act which is not done.

"An omission," is a not doing with a similar absence of consciousness.

These significations are clear and precise, and the terms

are convenient for expressing them. Sometimes, indeed, "omit" is used with the meaning to omit unlawfully, and "forbear" with the meaning to forbear lawfully. But although the terms are sometimes used in these more restricted senses, I think I am justified not only by convenience, but also by the usage of numerous and good writers, in attaching the above large significations to the terms in question. If you wish to denote "that a forbearance or omission is a breach of duty," you can accomplish that purpose by syling it "injurious" or "unlawful," or you may call it "culpable."

628. Injurious or culpable omissions are frequently styled "negligent." The party who omits, is said to "neglect" his duty. The omission is ascribed to his "negligence." The state of his mind at the time of the omission, is styled "negligence." These, I think, are the meanings usually attached to these terms; although the Roman lawyers, as I shall show immediately, have given them a larger signification.

629. "Heedlessness" differs from negligence, although they are closely allied.\*

The party who is negligent omits an act, and breaks a positive duty:

The party who is heedless does an act, and breaks a negative duty.

I endeavored in my last Lecture to illustrate my meaning, by an example to which I now refer you.† In the case supposed, I did not advert to the probable consequence of my act. And since it was my duty to advert to it, I am guilty of heedlessness, although I am clear of intentional injury.

630. The states of mind which are styled "Negligence" and "Heedlessness," are precisely alike. In

\* Bentham, "Principles," &c., pp. 86, 161.

† See p. 294, ante.

either case, the party is inadvertent. In the first case, he does not an act which he was bound to do, because he adverts not to it. In the second case he does an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each case.

631. The party who is guilty of Temerity or Rashness, like the party who is guilty of heedlessness, does an act, and breaks a positive duty. But the party who is guilty of heedlessness, thinks not of the probable mischief. The party who is guilty of rashness thinks of the probable mischief; but, in consequence of missupposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. Such, I think, is the meaning invariably attached to the expressions, "Rashness," "Temerity," "Foolhardiness," and the like. The radical idea denoted is always this—The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be adverted in the given instance. I will illustrate my meaning by recurring to the example already given (*ante*, p. 294).

When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may hit a passenger. But without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road; or that no one is there, the road being seldom passed. In either case, my confidence is rash; and, through my rashness or temerity, I am the author of the mischief. My assumption is founded upon evidence which the event shows to be worthless, and of which I should discover the worthlessness if I scrutinized it as I ought.

632. By the Roman lawyers, Rashness, Heedlessness, or Negligence, is, in certain cases, considered equivalent to "dolus:" that is to say, to intention. "Dolo comparatur." "Vix est ut a certo nocendi proposito discerni possit." Their meaning, I believe, was this:—

Judging from the conduct of the party, it is impossible to determine whether he intended, or whether he was negligent, heedless, or rash. And, such being the case, it shall be presumed that he intended, and his liability shall be adjusted accordingly, provided that the question arise in a civil action. If the question had arisen in the course of a criminal proceeding, then the presumption would have gone in favor of the party and not against him.

Such, I think, is the meaning which floated before their minds: although we must infer (if we take their expressions literally) that they believed in the possibility of a state of mind lying between consciousness and unconsciousness. If they believed in such a state of mind, it appears to me that they were under a mistake.

Intention, it seems to me, is a precise state of the mind, and can not coalesce or commingle with a different state of the mind. "To intend," is to believe that a given act will follow a given volition or act, or that there is a chance of its following his volition or act. Intention, therefore, is a state of consciousness.

*e.g.* : Instead of assuming confidently that the fence will intercept the ball, or that no passenger is then on the road, I may surmise that the assumption upon which I act is not altogether just. I think that a passenger may chance to be there, though I think the presence of a passenger somewhat improbable. Or though I judge the fence a stout and thick paling, I tacitly admit that a brick wall would intercept a pistol-shot more certainly. Consequently, I intend the hurt of the passenger who is actually

hit and wounded. I think of the mischief when I will the act ; I believe that my missupposition may be a missupposition ; and I, therefore, believe there is a chance that the mischief to which I advert may follow my volition.

But negligence and heedlessness suppose unconsciousness. In the first case, the party does not think of a given act. In the second case, the party does not think of a given consequence. Rashness, again, implies that although the actor has adverted to the consequence, he assumes that it will not follow in the particular instance. By the hypothesis he at the moment of action does not regard the consequence as a probable result of the act. If he regards the consequence as probable, though only in a slight degree, he intends it.

Now either the acting party thinks, or he does not think, of the act or consequence. And if he thinks of the consequence, he either regards or he does not regard it as probable. If he thinks of the act and consequence, and regards the consequence as probable, he intends. If otherwise, he is negligent, heedless, or rash.

It is, therefore, clear to me, that Intention is always separated from Negligence, Heedlessness, or Rashness, by a precise line of demarcation. The state of the party's mind is always determined, although it may be difficult (judging from his conduct) to ascertain the state of his mind.

Before I quit this subject, I may observe that hasty intention is frequently styled rashness. For instance, an intentional manslaughter is often styled rash, because the act is not premeditated, or has not been preceded by deliberate intention. Before we can distinguish hasty from deliberate intention, we must determine the nature of intention as it regards future acts. But it is easy to see that sudden or hasty intention is utterly different from rashness. When the act is done, the party contem-

plates the consequence, although he has not premeditated the consequence or the act.

I must here also advert to a convenient distinction suggested by Bentham. "Direct intention" may be conveniently used to imply that the consequence is not only intended, but desired. "Indirect intention" has been used to signify that the consequence, although intended, is not desired.

633. Having tried to analyze intention (where it is coupled with will), and to settle the notions of negligence, heedlessness, and rashness, I will now trouble you with a few remarks upon certain established terms.

634. *Dolus* denotes strictly, fraud: \*—"Calliditas, fallacia, machinatio, ad circumveniendum, decipiendum, fallendum alterum, adhibita."

By a transference of its meaning which is not very explicable, it also signifies intention, or intentional wrong, provided the intention be of the species which I have above termed direct intention: † "*Injuria qualiscunque scienter, admissa:*"—"Injuria quam quis sciens volensque commisit."

The use of the term *dolus* for the purpose of signifying intention, may, perhaps, be explained thus:

Fraud imports intention: For he who contrives or machinates ad decipiendum alterum, pursues a given purpose. For want, therefore, of a name which would denote Intention, the Roman lawyers expressed, it as well as they could, by the name of a something which necessarily implied it.

It is an instance of those generalizations which are so common in language; of the extension of a term denot-

\* Bentham, Pr. gr.

† The word *malus* is often coupled with *dolus* by the Roman lawyers. The reason is that there is a *dolus bonus*, a *machinatio*, which is innocent or laudable: artifice for example, which is made use of to prevent an impending crime. All other *dolus* is *dolus malus*, and this is the only meaning of *malus* when attached to *dolus*.



ing a species to the genus which includes that species. [*e.g.* Virtue.]

635. Culpa, as opposed to dolus, imports negligence, heedlessness, or temerity; as well as indirect intention: -- "Omnis protervitas, temeritas, inconsiderantia, desidia, negligentia, imperitia, quibus citra dolum, cui nocitum est." "Generatim, culpa dicitur quævis injuria ita admissa, ut jure imputari possit ejus auctori." In order that a given mischief may be imputed to another, "necesse est, ut culpa ejus id acciderit." That is to say, through his intention; or through his negligence, heedlessness, or temerity, as I have explained them above.

Again: the term Culpa is sometimes opposed to negligentia. In which case, these words have a very peculiar meaning.

Culpa, in this sense—sometimes distinguished as culpa Aquiliæ, to mark that a breach of the *lex Aquilia* is referred to—is restricted to delicts (*stricto sensu*).

The injuries done through Culpa, in this sense, "faciendo semper admittantur."

The injuries done "negligentia, when opposed to culpa in this sense, comprise all breaches of obligations, whether those obligations are positive or negative, and are committed "faciendo aut non faciendo."

Here then negligentia includes, Intention, Negligence (properly so called), Heedlessness, and Temerity.

Origin of this application. Negligentia opposed to Diligentia: *i.e.* that care which (*ex obligatione*) the obliged party, *e.g.* a trustee, bailee, &c., is often obliged to employ about the interests of another.

636. I have already remarked upon the extension of Dolus to Intention generally. In the English law the word "Malice" is sometimes employed with a similarly extended meaning. As malice (*stricto sensu*) implies intention, it has been extended to cases in which there is

no malice. The meaning in this case is wider than in the case of *dolus*, and extends to indirect intention; *e.g.* I shoot at A while B is standing by, and kill B, not desiring to do so, but knowing that his death was a probable consequence of my act. According to English law I am guilty of murdering B, that is to say, of slaying him "of malice aforethought."

637. To sum up in a few words the meaning of the leading terms on this subject in the Roman law. Unintentionality, and innocence of intention, seem both to be included in the case of *infortunium*, where there is neither *dolus* nor *culpa*. Unadvisedness coupled with heedlessness, and misadvisedness coupled with rashness, correspond to the *culpa sine dolo*. Direct intentionality corresponds to *dolus*. Oblique intentionality is included in *culpa*. [*Scientia*, but without the *voluntas nocendi*. *Prope dolum*, but not *dolus*.] Nothing can be more accurate.

## LECTURE XXI.

### *Intention further considered.*

638. The intentions which I considered in my last Lecture, are coupled with present volitions, and with present acts.

639. But a present intention to do a future act, is not coupled with the present performance of the act. For the intention, though present, regards the future. Nor is it coupled with a present will to do the act intended. For to will an act is to do the act, provided that the bodily organ, which is the instrument of the volition and the act, be in a sound or healthy state.

Consequently, to do an act with a present intention, is widely different from a present intention to do a

future act. In the first case, the act is willed and done. In the second case, it is neither willed nor done, although it is intended

640. A present intention to do a future act, may, I think, be resolved into the following elements.

1. The party desires a given object, either as an end, or as a mean to an end.

2. He believes that the object is attainable through acts of his own.

3. He presently believes that he shall do acts in future, for the purpose of attaining the object.

641. The belief "that the desired object is attainable through acts of our own," is obviously implied in the belief "that we shall do acts hereafter for the purpose of attaining it." For I can hardly believe that I shall try to attain an object which I know to be utterly beyond my reach.

Consequently, a present intention to do a future act may be defined to be: "A present desire of an object (either as an end or a mean), with the present belief by the party that he will do acts hereafter for the purpose of attaining the object." It is this belief which distinguishes the intention from a simple desire of the object. *e.g.* : If I wish for a watch hanging in a watchmaker's window, but without believing that I shall try to take it from the owner, I am perfectly clear of intending to steal the watch, although (if the wish recur frequently) I am guilty of coveting my neighbor's goods.

It may also be distinguished briefly from a present volition and intention, in the following manner :

In the latter case, we presently will, and presently act, expecting a given consequence. In the former case, we neither presently will nor presently act, but we presently expect or believe that we shall will hereafter.

When we intend a future act, it is commonly said

"that we resolve or determine to do it;" or "that we make up our minds to do it." Frequently, too, a verbal distinction is taken between a strong and a weak intention; that is to say, between a strong or weak belief that we shall do the act in future. Where the belief is strong, we are more apt to say "that we intend the act." Where the belief is weak, we are more apt to say "that we believe we shall do it."

It is clear that such expressions as "determining," "resolving," "making up one's mind," can only apply in strictness to "volitions": that is to say, to those desires which are instantly followed by their objects, and by which it may be said that we are concluded, from the moment at which we conceive them.

But when such expressions as "resolving" and "determining" are applied to a present intention to do a future act, they simply denote that we desire the object intensely, and that we believe, with corresponding confidence, we shall resort to means of attaining it.

And this perfectly accords with common apprehension, although it may sound like a paradox. For every intention which regards the future, is ambulatory or revocable. The present desire of the object may cease; and the belief that we shall resort to the means of attaining the object, will, of course, cease with the wish for it.

642. It is clear that we may presently intend a future forbearance as well as a future act.

We may either desire an object inconsistent with the act to be forborne, or we may positively dislike the probable consequences of the act. In the first case, we may presently believe that we shall forbear from the act hereafter, in order that we may attain the object which we wish or desire. In the latter case, we may presently believe that we shall forbear from the act hereafter, in

order that we may avoid the consequences from which we are averse.

All that can be said, in general, of intentions to act in future, may be applied, with slight modifications, to intentions to forbear in future. I confine myself to intentions to act in future, in order that my expressions may be less complex, and, by consequence, more intelligible.

643. When we intend a future act, we also intend certain of its consequences. In other words, we believe that certain consequences will follow that future act, which we presently believe we shall hereafter will.

But we may also intend or expect that the act may be followed by consequences which we do not desire, or from which we are averse. For example: I may intend to shoot at and kill you, so soon as I can find an opportunity. But knowing that you are always accompanied by friends or other companions, I believe that I may kill or wound one of these in my intended attempt to kill you; a consequence to which I am averse.

The execution of every intention to do a future act, is necessarily postponed to a future time.

644. Every intention to do a future act, is also revocable or ambulatory. That is to say, Before the intention be carried into execution, the desire which is the ground of the intention may cease or be extinguished, or, although it continue, may be outweighed by inconsistent desires.

645. The intention to do the future act may be precise and matured or it may not be so. For example, I may intend to kill you by shooting at a given place and time. Or, though I intend to kill you, I may neither have determined the mode nor the time and place for executing the murderous design.

646. It not frequently happens, that a long and complex series of acts and means is a necessary condition to

the attainment of the desired object, supposing it can be attained. To determine these means, or to deliberate on the choice of them, is commonly styled "a compassing of the desired object." Or, when the intended means are thus complicated, the intention is frequently styled *consilium*. Either of the terms denotes the deliberation or pondering, which necessarily attends the intention before it becomes precise.

Such, I think, are the proper meanings of compassing and *consilium*. But it must be confessed, that the terms are frequently applied loosely. In the language of the English Law, you would compass and imagine the death of the King, although you intended to slay him by the shortest and simplest means.

647. It frequently happens that the desired object is not accomplished by the intended act.\* For example, I point a gun, and pull the trigger, intending to shoot you. But the gun misses fire, or the shot misses its mark. In this case, the act is styled an attempt: an attempt to accomplish the desired object. It also frequently happens, that several acts must be done in succession before the desired object can be accomplished. And the doing any of the acts which precede the last, is also styled an attempt. For example: To buy poison for the purpose of killing another, or to provide arms for the purpose of attacking the king, are attempts or endeavors towards murder or treason. Attempts are evidence of the party's intention; and, considered in that light, are styled in the English Law, "overt acts."

Where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal inten-

\* "*Delictum consummatum. Conatus delinquendi.*" *Consummate Crimes and Criminal Attempts.*—Feuerbach, p. 41.

"Eine Handlung, welche die Hervorbringung eines Verbrechens zum zwecke hat, ohne den bezweckten verbrecherischen Thatbestand wirklich zu machen, ist ein Versuch."—Rosshirt, p. 85.

tion.\* Sometimes he is punished as severely as if he had accomplished the intended object. But more commonly with less severity.

The reason for requiring an attempt, is probably the danger of admitting a mere confession.† When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity, or may be invented by the witness to it.

648. I have here considered the import of the term "Intention," in order that I might elucidate the general nature of Injuries.

649. But the word intention is often employed, without reference to wrongs. We speak of the intention of the legislator, in passing a law; of the intention of testators; of the intention of parties to contracts, and so on. In each of these cases, the notion signified by the term "Intention" may be reduced to one of the notions which I have already endeavored to explain: namely, a present volition and act, with the expectation of a consequence; or a present belief, on the part of the person in question, that he will do an act in future.

When we speak of the intention of the legislator, we either advert to the purpose with which he made the law; or we advert to the sense which he annexed to his own expressions, and in which he wished and expected that others would understand them. In either case we mean that he willed and performed a given act, expecting a given consequence: *e.g.*—that he made the provision, expecting the purpose would be attained; or that he used his words with a certain sense, expecting that others would understand them in the same sense.

\* I venture to think, in accordance with my remarks in the note on p. 250 ante, that the ratio of this punishment is more simple, and that the *consilium* or *cogitatio* for which the party is punished is an act evidenced by the overt act.—R. C.

† Example of a man punished for confessed intention (without overt act) to kill Henry III. of France,

When we say, that "the will or intention of the testator is ambulatory," we mean that "he may will and intend anew."

When we speak of the intention of contracting parties, we mean the sense in which it is to be inferred from the words used, or from the transaction, or from both, that the one party gave and the other received the promise. Paley's rule \* would lead to this: that a mistaken apprehension by the promisor of the apprehension by the promisee, would exonerate the promisor. This would be to disappoint the promisee. If the apprehension of the promisee did not extend to so much as the promisor apprehends that it did, it is true that the promisor is not surprised by a more onerous obligation than he expected; but then there is no reason for giving the promisee an advantage which he did not expect: pain of loss being greater than the mere pleasure of gain, which this advantage would be. But by the hypothesis no expectation is raised, and there is therefore no engagement.

If, on the other hand, the promisor underrates the expectation of the promisee he disappoints an expectation.

The true rule is the understanding of both parties. If the facts in evidence are such as to raise the legal inference that the understanding of the parties differed materially, there is no consensus and therefore no contract. But if the instrument in writing was understood

\* "Where the terms of a promise admit of more senses than one, the promise is to be performed 'in that sense which the promisor apprehended, at the time that the promisee received it.'

"It is not the sense in which the promisor actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged, to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements you never designed to undertake. It must therefore be the sense (for there is no other remaining) in which the promisor believed that the promisee accepted his promise."—Paley, *Moral and Polit. Philosophy* vol. i., ch. v.



by both to contain the terms of their contract, so that it became the medium of the consensus, then the instrument is the only admissible evidence of what those terms were. In the example, Paley seems to confound the sense which the promisor, in common with all, must have put on his promise, with his secret intention of breaking it.

The sense of the promise, *i.e.* the meaning which each party apprehends that the words or transaction must denote, is a totally different thing from the intention of the parties: but commonly agrees with their intention. Each of the parties does a present act, expecting a given consequence.

## LECTURE XXII.

### *Sanction.*

650. The difference between Sanction and Obligation is simply this.

Sanction is evil, incurred, or to be incurred by disobedience to command.

Obligation is liability to that evil, in the event of disobedience.

Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms.

If the party has acted or forborne agreeably to the command, he has fulfilled the obligation wholly or in part. And here there is a certain difference between positive and negative duties. The performance of a positive duty extinguishes both the duty and the corresponding right: a negative duty is never extinguished by fulfillment, though if the right be extinguished by another cause, the duty ceases.

It is not unfrequently said "that Sanctions operate upon the Will," and "that men are obliged to do or forbear through their wills."

It were more correct to say "that Sanctions operate upon the desires," and "that men are obliged to do or forbear through their desires."

Stated plainly and precisely, the fact is this. The party obliged is averse from the conditional evil, which he may chance to incur in case he break the obligation: In other words, he wishes or desires to avoid it. But, in order that he may avoid the evil, or may avoid the chance of incurring it, he must fulfill the obligation: He must do that which the Law enjoins, or must forbear from that which the Law prohibits.

That every sanction operates upon the desires of the obliged, is true. For he is necessarily averse from the evil with which he is threatened by the Law, as he is necessarily averse from every evil whatsoever.

That every sanction operates upon the will of the obliged, is not true. If the duty be positive, and if he fulfill the duty out of regard to the sanction, it may be said with propriety that the sanction operates upon his will. For his desire of avoiding the evil which impends from the Law, makes him do, and, therefore, will, the act which is the object of the command and the duty. But if the duty be negative, and if he fulfill the duty out of regard to the sanction, it can scarcely be said with propriety that the sanction operates upon his will. His desire of avoiding the evil which impends from the Law, makes him forbear from the act which the Law prohibits. But, though he intends the forbearance, he does not will the forbearance. He either wills an act which is inconsistent with the act forborne, or he remains in a state of inaction which equally excludes it.

651. The proposition that we are obliged through our

wills is therefore only true in the case of a positive duty, and in this sense, namely, that the Law threatens us with the sanction, in order that we may act; and in order that we may act, we must will. The force of the obligation lies in our desire of avoiding the threatened evil. But, in order that we may avoid that evil by performing the obligation, we will the act which is commanded. In the case of a positive duty, therefore, it may be truly said that we are obliged to will, or that we are obliged through our wills.

And this is true. For acts and their consequences are the objects of positive duties; and every volition is followed by the act which is willed, if the appropriate bodily organ be sound or healthy.

652. And here I may remark that we can not be obliged to desire or not to desire in the sense in which desire is opposed to will; *i.e.* to desire that which the Law enjoins, or not to desire that which the Law forbids: For although we desire to avoid the sanction, we are not therefore averse from that which the Law forbids, nor do we therefore incline to that which the Law enjoins.

In spite of our aversion from the evil with which we are menaced by the Law, we may still desire that which the Law forbids, or may desire to evade that which the Law exacts: although our necessary desire of avoiding the sanction, may be stronger than the opposite desire which urges us to a breach of our duty. The desire of avoiding the sanction may control the opposite desire, but can not supplant or destroy it, unless in the oblique or indirect manner to which I shall advert immediately.

It is equally manifest, that we are not obliged to our desire of avoiding the sanction. We are not bound or obliged to entertain the desire; but we are bound or obliged, because we are threatened with the evil, and because we inevitably desire to avoid the evil.

653. When we desire that which the Law forbids, or when we are averse from that which the Law enjoins, we observe our duty (supposing we do observe it) because our aversion from the sanction overcomes the conflicting wish.

In these, and in similar cases, it is not unusual to suppose a conflict between desire and will. Because we will a something from which we are averse, it is imagined that we will against our desires. The truth, however, is, merely that we will or forbear in compliance with a stronger desire, instead of forbearing or willing in compliance with a weaker desire.

It is truly astonishing that this obvious solution of the difficulty escaped the penetration of Mr. Locke. It is of no small importance that the difficulty should be clearly conceived, and the solution distinctly apprehended. For I believe that the mysterious jargon about the nature of the will has arisen entirely from this purely verbal puzzle.

654. I have said that we can not be obliged not to desire; that the desire of avoiding the sanction may master or control, but can not extinguish a desire which urges to a breach of duty.

But this, though true in the main, must be taken with an important qualification. The desire of avoiding the sanction; though it can not destroy directly the conflicting and sinister desire, may do so gradually or in the way of association. The thought of the act or forbearance which would amount to a breach of duty, is habitually coupled with the thought of the evil which the Law annexes to the wrong. If our desire of avoiding the evil, which the Law annexes to the wrong, be stronger than our desire of the consequences which might follow the act or forbearance, we regard the latter as a cause of probable evil, and we gradually transfer to the cause our aversion from

the effect. Our stronger desire of avoiding the Sanction, gradually extinguishes the weaker desire.

655. This is merely a case of a familiar and indisputable fact. Objects originally agreeable become disagreeable on account of their disagreeable consequences. And objects originally pleasing become displeasing by reason of painful consequences with which they are pregnant.

This gradual effect of sanctions in extinguishing sinister desires, is a matter of familiar remark, and is expressed in various ways. Owing to the prevalent misconceptions regarding the nature of the will, the effect which is really wrought upon the state of the desires is frequently ascribed to the will.

We are told, for instance, by Hobbes, in his "Essay on Liberty and Necessity," "that the habitual fear of punishment maketh men just:" "that it frames and moulds their wills to justice." The plain and simple truth is this; that it tends to quench wishes which urge to breach of duty, or are adverse to that which is *jussum* or ordained.

656. Where the fear of the evils which impend from the Law has extinguished the desires which urge to breach of duty, the man is just. He is not compelled or restrained by fear of the sanction, but he fulfills his duty spontaneously. He is moved to right, and is held from wrong by that habitual aversion from wrong or injury, which the habitual fear of the sanction has gradually begotten. He comes to love justice with disinterested love, and to hate injustice with disinterested hate. So far as he fulfills his duties through these disinterested affections, the man is just. "*Justitia est perpetua voluntas suum cuique tribuendi.*"

The man who fulfills his duty because he fears the sanctions is an unjust man, although his conduct is just. If he were freed from the fear which compels or restrains

him, his conduct would accord with the sinister desires and aversions, which solicit or urge him to violate his duty.

657. When I affirm that our fear of the evils by which our duties are sanctioned is frequently transmuted into a disinterested hate of injustice, I am far from intimating that that fear is the only source of this beneficent disposition. The love of justice, or the hate of injustice, is partly generated, no doubt, by a perception of the utility of justice, and by that love of general utility which is felt by all or most men more or less strongly. But it is also generated, in part, by the habitual fear of sanctions. The effect of sanctions is therefore of a double character; their remote or indirect effect—to inspire a disinterested love of justice; their proximate and direct effect—to compel us to right, or restrain us from wrong, in case that useful sentiment be absent or defective.

When the desires of the man habitually accord with his duty, we say that the man has a disposition to justice. And this disposition is a ground for mitigation in measuring out punishment or in measuring out censure.

Every legal crime should be visited with legal punishment, and every offense against morals should be visited with reprobation. The general consequences which would ensue if the offender passed with impunity, render it expedient that it should be visited with punishment or censure. But since there would be few offenses if good dispositions were general, it is also expedient to mitigate the punishment or censure, having regard to the good disposition manifested by the criminal.

And this, accordingly, is the usual habit of the world. The occasional aberrations of a man who is habitually just or humane, are treated with less severity, both in regard to legal and moral sanctions, than the offenses of the dishonest and the cruel.

Where the desires of the man are habitually adverse to his duty, we may properly call the state of his mind a disposition to injustice.

Owing to the prevalent misconceptions about the nature of will, we frequently style the predominance of pernicious desires, a depraved or wicked will. Sometimes, indeed, we mean by a depraved or wicked will a deliberate intention to do a criminal act. Although it is perfectly manifest, that badness or goodness can not be affirmed of the will, and that a criminal intention may accord with a good disposition.

## LECTURE XXIII.

### *Physical Compulsion Distinguished from Sanction.*

658. I now proceed to distinguish physical compulsion or restraint from the restraint which is imposed by duty or obligation.

A sanction is a conditional evil. The party obliged is obliged, because he incurs the risk of this evil in the event of disobedience, and because he desires to avoid it. Desiring to avoid the sanction, or else through a disinterested motive (probably begotten of the sanction through the process of association) he desires to fulfill the duty, and in accordance with this desire he wills the act or intends the forbearance which is the object of the duty.

Consequently, the compulsion or restraint which is implied in Duty or Obligation, is hate and fear of an evil which we may avoid by desiring: by desiring to fulfill a something, which we can fulfill if we wish.

659. Other compulsion or restraint may be styled merely physical.

For example: I am imprisoned in a cell from which I am able to escape; but knowing that I may be punished

in case I attempt to escape, the fear of the probable punishment determines or inclines me to stay there. In his case it may be said I am obliged to stay in my cell.

But if I am imprisoned in a cell of which the door is locked, physical restraint is applied to my body. I cannot move from my cell, although I desire to move from it. Whether I shall quit, or whether I shall stay in my cell, depends not upon my desires.

Again: if the judge sentence me to imprisonment, he may command that I shall be dragged to prison in case I refuse to go, or he may command me to go to prison under peril of an additional punishment. If I go to prison through dislike of being dragged there, or fear of the additional punishment, it may be said that I am obliged to go, or that I desire to go as a means of avoiding the greater evil. But if I refuse to go to prison, and am dragged thither by the officers without a movement of my own, physical compulsion is applied to my body. Whether I shall move to prison or not, depends not upon my desires.

660. Physical compulsion may affect the mind as well as the body.

As I observed in a former Lecture, the dominion of the will extends not to the mind.\* That is to say, no change in the state of the mind is immediately accomplished by a mere desire. But changes in the mind may be wrought through means to which we resort in consequence of such desires: *e.g.* acquiring knowledge of a particular science by reading, writing, and meditation.

But a change in the mind may be wrought or prevented, whether we desire the change or whether we do not desire it. And, in all such cases, it may be said that the mind is affected by physical compulsion or restraint.

The conviction produced by evidence, is a case of phy-

\* P. 201, *ante*.



sical compulsion. If I perceive that premises are true, and that the inference is justly drawn, I admit the conclusion, though I do not wish to admit it, or though the truth be unwelcome. Accordingly, if I love darkness, and hate the light, I refuse to examine the proofs which might render the truth resistless, and dwell with complacency upon every shadow of proof which tends to confirm my prepossession.\*

661. I observe that certain writers talk of obligations to suffer, and of obligations not to suffer.† And, as an instance of an obligation to suffer, they cite the supposed obligation to suffer punishment, which is incumbent upon a criminal.

But it is clear that we can not be obliged to suffer or not to suffer. For whether we shall suffer, or shall not suffer, does not depend upon our desires; although by acts or forbearances which do depend upon our desires, we may induce suffering upon ourselves, or we may avert suffering from ourselves.

662. The Criminal who is condemned to punishment is never obliged to suffer, although (*e.g.*, under the rules of prison discipline) he may be obliged to acts which facilitate the infliction of the suffering, or may be obliged to forbear from acts which would prevent or hinder the infliction. But in the last result every obligation is sanctioned by suffering, that is to say, by some pain which may be inflicted upon the wrong-doer independently of an act or forbearance of his own. If this were not the case, and if every obligation were sanctioned by a further obligation, no obligation could be effectual.

Either in the first instance, or at some subsequent

\* For this reason, non-belief may be blameable. Where (*e.g.*) it is the result of insufficient examination, refusal to examine, partiality or antipathy indirectly removable, &c.

† *Traité*s, &c., vol. i., pp. 239, 245.

point, I must be visited with a sanction which can be inflicted without my consent.

For example: I am condemned to restore a horse which I detain from the owner; to make satisfaction for a breach of contract; to pay damages for an assault, to the injured party; to pay a fine for the same offense.

The sanction which attaches upon me, in this the first stage is an obligation: an obligation to deliver the horse, or to pay the damages or fine.

If I refuse to perform this obligation, I may incur a further obligation: for instance, an obligation to pay a fine under sanction of imprisonment or of having my goods seized in execution.

Suffering, therefore, is the ultimate sanction.

But though suffering is the ultimate sanction, we can not be obliged to suffer. For that supposes that we can be obliged to a something which depends not upon our desires. The only possible objects of duties or obligations are acts and forbearances.

## LECTURE XXIV.

### *Injury or Wrong, Guilt, Imputability.*

663. I now proceed to consider the import of "guilt" or "imputability"; which it is necessary to determine in order that we may fully apprehend the nature of injury or wrong.

664. That an act or acts may be done or forborne is the immediate purpose of a positive or of a negative duty respectively. The production of events by which the act or forbearance may be followed, or the prevention of events which may happen if the act be not done or forborne, is the more remote purpose for which the duty is imposed.

665. Certain forbearances, omissions, and acts, are injuries or wrongs.

The persons who have in those certain ways forborne, omitted, or acted, are guilty. Or the persons who have forborne, omitted, or acted, are in that plight or predicament which is styled "guilt."

Those certain forbearances, omissions, or acts, together with such of their consequences as it was the purpose of the duties to avert, are imputable to the persons who have forborne, omitted, or acted. Or the plight or predicament of the persons who have forborne, omitted, or acted, is styled "imputability."

666. All these expressions, it appears to me, are equivalent. They all of them denote this, and nothing but this: "that the persons who have forborne, omitted, or acted, have thereby violated or broken duties or obligations." Such forbearances, omissions, or acts, are wrongs or injuries. The parties so forbearing, omitting, or acting are guilty, and their plight is styled guilt or imputability.

667. As I shall show hereafter, intention, negligence, heedlessness, or rashness, is an essentially component part of injury or wrong, or of breach or violation of duty or obligation; and is a necessary condition precedent to the existence of the predicament styled guilt or imputability.

But intention, negligence, heedlessness, or rashness, is not of itself injury or wrong; is not of itself breach of duty; will not of itself place the party in the plight or predicament of guilt or imputability. Action, forbearance, or omission, is as necessary an ingredient in the notion of injury, guilt, or imputability, as the intention, negligence, heedlessness, or rashness, by which the action, forbearance, or omission, is preceded or accompanied. The notion of injury, guilt, or imputability, does not

consist of either considered alone, but is compounded of both taken in conjunction.

668. This may be made manifest by a short analysis.

If I am negligent, I advert not to a given act : And, by reason of that inadvertence, I omit the act.

If I am heedless, I will and do an act, not adverting to its probable consequences : And, by reason of that inadvertence, I will and do the act.

If I am rash, I will and do an act, adverting to its probable consequences ; but, by reason of a missupposition which I examine inadvertently, I think that those probable consequences will not ensue. And, by reason of my insufficient advertence to the ground of the missupposition, will and do the act.

Consequently, negligence, heedlessness, or rashness connote an omission or act, and denote the inadvertence from which the omission or act ensues.

If I intend, my intention regards the present, or my intention regards the future. If my intention regards the present, I presently do or forbear from an act, expecting consequences. These expressions, therefore, negligence, heedlessness, rashness, present intention, all derive their significance from an act or forbearance. That he has done or omitted is necessarily predicable of him who is negligent, heedless, rash, or who has formed an intention of the kind which relates to a present act or forbearance.

If, however, my intention regard the future, I presently expect or believe that I shall act or forbear hereafter.

669. And, in this single case, it is, I think, possible to imagine, that mere consciousness might be treated as a wrong ; might be imputed to the party ; or might place the party in the plight or predicament which is styled imputability or guilt.

We might, I incline to think, be obliged to forbear from

intentions which regard future acts, or future forbearances from action: Or, at least, to forbear from such of those intentions as are settled, deliberate, or frequently recurring to the mind. The fear of punishment might prevent the frequent recurrence; and might therefore prevent the pernicious acts or forbearances, to which intentions, when they recur frequently, certainly or probably lead.

Without, however, staying to inquire, whether we might be obliged to forbear from naked intentions as regards the future, I assume, for the present,\* the following conclusion; a conclusion which accords with general or universal practice.

Intention, in the sense of present intention, negligence, heedlessness, or rashness, is not of itself wrong, or breach of duty or obligation; nor does it of itself place the party in the predicament of guilt or imputability. In order that the party may be placed in that predicament, his intention, negligence, heedlessness, or rashness, must be referred to an act, forbearance, or omission, of which it was the cause.

670. In the language of lawyers, however, and especially of criminal lawyers, "guilt" or "culpa" is frequently restricted to the state of the party's mind—his intention, negligence, heedlessness, or rashness, as the case may be. To show this, I will transcribe a few passages from two treatises on German Criminal Law.

671. One of them is the work of Feuerbach, the most celebrated Criminal Lawyer now living;† formerly professor of Roman and German Jurisprudence, and now president of a Court of Appeal in the Kingdom of Bavaria.

\* The argument by which this position is established will be found in the next Lecture. See p. 329, *infra*.

† He died in 1833. The passage quoted is at pages 78, 79, of his work

The other is by Dr. Rosshirt, professor of Law at Heidelberg.

Feuerbach's book is entitled, "Institutes of the Penal Law which obtains generally in Germany."

The title of Dr. Rosshirt's book may be translated as follows: "Institutes of the Criminal Law which obtains generally in Germany; including a particular Exposition of Roman Criminal Law, in so far as the German is derived from it."

"The application," says Feuerbach, "of a penal Law, supposes that the will of the party was determined positively or negatively; that this determination of the will was contrary or adverse to the duty imposed by the Law; and that this determination of the will was the cause of the criminal fact." "The reference of the fact as effect to the determination of the will as cause, constitutes that which is styled imputation. And a party who is placed in such a predicament, that a criminal fact may be imputed to a determination of his will, is said to be in a state or condition of imputability."

"The reference of the fact as effect to the determination of the will as cause, settles or fixes the legal character of the latter."

"In consequence of that reference, or by reason of the imputation of the fact, the determination of the will is held or adjudged to be guilt; which guilt is the ground of the punishment applied to the party."

He adds, in a note, that the "*culpa*" of the Roman Lawyers, as taken in its largest signification, and also the "*reatus*" of more recent writers upon jurisprudence, answers to the "*Schuld*" or "*das Verschulden*" of the German Law.

"*Culpa*," as taken in its largest signification, *reatus*, and "*Schuld*," or "*das Verschulden*," may, I apprehend, be translated by the English "*Guilt*."

The language of Dr. Rosshirt accords with that of Feuerbach.\* "In order," says he, "to the existence of a Crime, the will of the party must have been in such a predicament, that the criminal fact may be imputed; that is to say, that the criminal fact may be imputed as effect to the state of his will as cause."

672. "The term '*Culpa*,' as used by the Roman Lawyers, is frequently synonymous with Crime or Delict, or with Injury generally. But, when they employ it in a stricter sense, it is equivalent to the *reatus* of modern philosophical jurisprudence, to the *Verschulden* of the German Law. It denotes the state of the party's will, considered as the cause of the criminal fact. It denotes the *dolus*, or the *negligentia*, of which the criminal fact is the ascertained consequence or effect."

In translating these passages I have thrown overboard certain terms borrowed from the Kantian Philosophy. For the modern German Jurists, like the Classical Jurists of old, are prone to show off their knowledge of Philosophy, though actually occupied with the exposition of municipal and positive Law.

These impertinent terms being duly ejected, the meaning of the passages is clear and simple.

It merely amounts to this. "*Culpa*" denotes the state of the party's mind—his intention, negligence, heedlessness, or rashness; although it connotes, or embraces by implication, the positive or negative consequence of the state of his mind.

But I think that the term "*Guilt*," as used by English lawyers, denotes not only the state of the party's mind, but also the act, forbearance, or omission, which was the consequence. It imports generally "that the party has broken a duty." It embraces all the ingredients which enter into the composition of the wrong;

\* Pages 35-42 (*Id.*).

and is not restricted to one of those necessary ingredients.

And this extended meaning of the word guilt is likewise, I think, the meaning which convenience prescribes. A general expression for culpable intention, and for the various modifications of negligence, tends to confusion and obscurity rather than to order and clearness. I am not aware of a single instance, in which it can be necessary to talk of them collectively. But it is often necessary to distinguish them.

673. Before I conclude this Lecture, I will remark that the term "Injury," and also the term "Guilt," is merely the contradictory of the term "Duty" or "Obligation."

If I am bound or obliged to do, I am bound or obliged not to prætermitt the act intentionally or negligently.

If I am bound or obliged to forbear, I am bound or obliged not to do the act intending certain consequences, or not to do the act heedlessly or rashly.

I am not absolutely obliged to do or forbear, but to do or forbear with those various modifications.

If I prætermitt an act intentionally or negligently, I break a positive duty.

If I do an act intending certain consequences, or if I do an act heedlessly or rashly, I break a negative duty.

An injury, or breach of duty, is therefore the contradictory of that which the Law imposing the duty enjoins or forbids:—"Id quod non jure fit."

674. *Corpus delicti*, a phrase introduced by certain modern civilians, is a collective name for the sum or aggregate of the various ingredients which make a given fact a breach of a given Law.\* *Corpus* is used by the Roman lawyers, like *universitas*, to express every whole composed of parts, as in the phrase *corpus juris*, which with the Roman lawyers stood for the aggregate

\* For *Corpus Delicti*, see Feuerbach, 75, 76; Rosshirt, 79.



of the laws, though by the moderns it is applied to the particular volumes which contain Justinian's collections.

Adopting this expression, attempts may be thus distinguished from consummation of a criminal purpose. For want of the consequence there is not the Corpus of the principal delict. But the intention coupled with an act tending to the consequence constitutes the corpus of the secondary delict styled an "attempt."

*Ambiguity of Schuldner, Reus, &c.*

675. I stated in a former note (p. 167 supra) one ambiguity adhering to the terms "jus," "recht," or "right," Each of these terms is sometimes applied with a third meaning, namely as denoting the duty incumbent on the party obliged. "I have a right to do it," meaning "I am obliged," is good Saxon English. The "Obligatio" of the Roman Lawyers denotes the jus in personam residing in the party entitled, as well as the obligation incumbent upon the party obliged.

The German "Schuld," or "das Verschulden," has a similar ambiguity. "Schuld" signifies properly "liability." To impute to a person "Schuld," is to say that he has broken a duty, and is now liable to the sanction. Accordingly, "Schuldner" is synonymous with the Roman "Debitor;" which applies to any person lying under any obligation; that is to say, an obligation *stricto sensu*, or in the sense of the Roman Lawyers. But it is remarkable that "Schuldner," in the older German Law, applied to the Creditor, as well as to the Debitor.

The Reus of the Roman Lawyers is the same predicament. As opposed to "Actor," it signifies the defendant in a civil proceeding, or the party who is the object of accusation in a criminal proceeding. And, taken in this sense, it is not ambiguous.

676. But *reus* also signifies a party to a stipulation; that is to say, a unilateral contract accompanied by peculiar solemnities. And, taken in this sense, it applies to the promisee or obligee, as well as to the promisor or obligor. Both are *rei*. The party who makes the promise is styled *reus promittendi*: The party to whom it is made, and by whom it is accepted, is styled *reus stipulandi*. *Correi promittendi* are joint promisors: *Correi stipulandi*, joint promisees.

"Creditor," is the correlative of "Debitor," and applies to any person who has *jus in personam*. The French "*Débiteur*" and "*Créancier*" have precisely the same meanings. The English "*Obligor*" and "*Obligee*" ought to bear the same significations. But, in the technical language of our Law, the term "*obligation*" or "*bond*" has been miserably mutilated. Instead of denoting *obligatio* as correlating with *jus in personam*, it is applied exclusively to the writing under seal by which certain unilateral contracts are evidenced. That is to say, it is not the name of an obligation, but of an instrument evidencing a contract from which an obligation arises.

In the strict technical import which it bears in the English Law, the meaning "*debt*" is not less narrow and inconvenient than the meaning of "*bond*" or "*obligation*."

In the Roman Law, the term "*debitum*" is exactly co-extensive with the related or paronymous expression "*debitor*." As "*debitor*" signifies generally a person lying under an obligation, "*debitum*" denotes, with the same generality every act or forbearance to which a person is obliged; "*id quod ex obligatione præstandum est.*"

But in the strict technical import which it bears in the English Law, "*debt*" is restricted to a definite sum of money, due or owing from one party to another party.

## LECTURE XXV.

*Analysis of Injury or Wrong continued.—Grounds of Non-imputability.*

677. I assumed, in my last Lecture (p. 317, *supra*), that Intention, Negligence, Heedlessness, or Rashness is a necessary ingredient in injury or wrong.

A short analysis will show the truth of the assumption. Reverting to my definition (p. 316), an injury is a forbearance, omission, or act, whereby a person has violated a duty. Now there can obviously be no breach of duty—no rupture of the *vinculum juris*—unless the duty has some binding force, that is to say, unless the sanction were capable of operating as a motive to the fulfillment of the duty. But sanctions operate upon the obliged in a twofold manner; that is to say, they counteract the motives or desires which prompt to a breach of duty, and they tend to excite the attention which the fulfillment of duty requires. And unless the party knew that he was violating his duty, or unless he might have known that he was violating his duty, the sanction could not operate, at the moment of the wrong, to the end of impelling him to the act which the Law enjoins, or of deterring him from the act which the Law forbids.

Consequently, injury or wrong supposes unlawful intention, or unlawful inadvertence. And it appears from the foregoing analysis, that every mode of unlawful inadvertence must be one of those which are styled negligence, heedlessness, or rashness.

678. The only instance wherein intention or inadvertence is not an ingredient in breach of duty is furnished by the Law of England. By that Law, in cases of Obligation arising directly from contract, it frequently hap-

pens that the performance of the obligation is due from the very instant at which the obligation arises. Or, speaking more accurately, the time for the performance is not determined by the contract, and performance is due so soon as the obligee shall desire it.

For example : if a movable be deposited with me in order that I may keep it in safety, I am bound, from the moment of the deposit, to restore it to the bailor.

If I buy goods, and no time be fixed for the payment of the price, I am bound, from the moment of the delivery, to pay the price to the seller.

Now, in these, and in similar cases, it is impossible that the obligation should be broken, through intention or inadvertence, until the obligee desire performance, and until the obligor be informed of the desire. For, strictly speaking he is bound to perform the given act, so soon as the obligee shall wish the performance, and so soon as he himself shall be duly apprised of the wish. But, according to the rule which obtains in the Courts of Common Law, the creditor may sue the debtor, as for a breach of the obligation, without a previous demand : The debtor being liable in the action for damages and costs, just as he would be liable if performance had been required, and the obligation had then been broken through his own intention or negligence.

Now as every right of action is founded on an injury, here is a case of injury without intention or inadvertence. For, without a previous demand, or without some notice or intimation that the creditor desires performance, the debtor can not know that he is breaking his obligation, by not performing the act to which he is obliged.

This monstrous rule of the Common-Law Courts, is justified by a reason which is not less monstrous. For it is said that a previous demand were superfluous and needless, inasmuch as the action is itself a demand.

The reason forgets, that a right of action is founded on an injury ; that unlawful intention or inadvertence is of the essence of injury ; and that, in all the cases which I am now considering, there is no room for unlawful intention or inadvertence, until the creditor desires performance, and until the debtor be apprised of the desire.

679. In looking over Evans's Digest of the Statutes for another purpose, I have had great pleasure in observing that so judicious a writer takes the same view of this question which I have just stated. He says (vol. iii. p. 289) : " There is another Rule in Courts of Equity which may deserve a different consideration, as applied to legal demands, viz., that length of time there is no bar in case of a trust. Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right ; for, until then, there is nothing adverse ; and I conceive that upon principle, no action should be allowed in these cases, without a previous demand ; consequently, that no limitation should be computed further back than such demand. And I think it probable that, under these circumstances, the limitation would not be allowed to attach, though the other part of the observation would be as probably disallowed. For a sweeping rule has been by some means introduced into practice, that an action is a demand ; whereas every action in its nature supposes a preceding default ; where money is improperly received, or goods are bought without any specific credit, or even where money is borrowed generally, there is held to be an immediate duty, and it is a perfectly legitimate conclusion that no demand can be necessary, in addition to the duty itself. But wherever there is a loan in the nature of a deposit, or any other confidential duty is contracted, the mere creation of that duty, unaccompanied

with the absolute breach of it, by denial or inconsistent conduct, ought not to be considered as a ground of action."

I perfectly agree with this reasoning as applied to the case of the deposit.

But similar reasoning is also applicable to the case of goods sold without specific credit; of money lent generally; and of money paid and received by mistake.

In the case of money paid and received by mistake, it is necessary to distinguish.

If the money was received bona-fide, it surely is expedient that a demand should precede the action.\* For until the debtor is apprised of the mistake, it is impossible to say that he has broken intentionally or by negligence his obligation to return the money.

If the money was received mala fide, the act of receiving the money was in itself an injury: an injury analogous to unlawful taking. In certain cases of the class I am now considering, it is indeed expedient that the creditor should be permitted to sue, although no demand has been made upon the debtor. But why? Because the debtor has actually broken the obligation: or because he intends to break it, and the delay occasioned by a formal demand might facilitate the execution of his unlawful design. For example; if the debtor withdraw himself from his home to evade a demand.†

680. I shall here remark, generally, a distinction which

\* And the demand in such a case was thought necessary by Martin and Bramwell, BB., in *Freeman v. Jeffries*, May 6, 1869, L. R. 4 Exch. 199, 200.

† It might be added that in the case of apprehended insolvency, if some creditors were obliged to make a previous demand while others could sue without one, the former class would be at a disadvantage in the race for securing their claims. This consideration is some set-off against the hardship of the legal rule. But the reason why the existence of this rule is found tolerable in practice is this:—The moral sanction which prevents undue advantage being taken of it is a strong one. "A respectable attorney will always make a demand of some sort on behalf of his client before complying with his instructions as to issuing the writ."—Broom, *Com. Law*, 4th ed. p. 114.—R. C.

exists between obligations arising from the possession of *res alienæ*, or things which are the property of another person. The party entitled has always a right to the restitution of the goods or to satisfaction for their loss, and the party in possession is always bound to restore or satisfy.

But the nature of the obligation depends upon the consciousness of the party in possession : \* If he possess the subject *mala fide*, his possession is itself a wrong. His obligation to restore or satisfy, arises from an injury ; and, inasmuch as the right which is violated is *jus in rem*, the obligation is *ex delicto*, strictly speaking.

If he possess the subject *bona fide*, his possession is not a wrong. His obligation to restore or satisfy is *quasi ex contractu* : That is to say, It arises from a fact which is neither an injury nor a convention. But as soon as he is apprised of the right which resides in the party entitled, the obligation alters its nature. It may either be considered as arising from a breach of the quasi-contract ; or from a violation of the *jus in rem* which resides in the party entitled. And, on either supposition, it arises from an injury.

The allegation in bills in Chancery, " that the plaintiff has requested the defendant to perform the object of the suit, but that the defendant has refused or neglected to comply with that request," is, in a case where injury is otherwise shown, merely formal ; *i.e.*, it is not incumbent on the plaintiff to prove it. But where notice must be given, before the defendant can commit

\* In those actions in English law which are deemed to arise out of tort, the principle maintained in the text is recognized. In *trover* (to use the expression properly belonging to the period before the C. L. P. Acts), intention is of the essence of the wrongful conversion. In *detinue*, intention or negligence. In both cases the evidence may and commonly does consist of proof of demand and refusal. But to prove conversion, it must be further shown that at the time of the demand the goods were in defendant's custody.—R. C.

an injury, there, I apprehend, a demand on the part of the plaintiff, with subsequent refusal or neglect on the part of the defendant, is a necessary preliminary to the institution of the suit. *E.g.*: If you are seized in fee in trust for me, you are bound to convey the legal estate as I shall direct. But if I filed a bill for the purpose of compelling a conveyance without previous demand and consequent refusal or neglect, I think that Equity (who, let men traduce her as they may, is far more rational than her sister and rival Law) would compel me to pay the costs of the wanton and vexatious suit.

681. The Roman Law, in regard to the matter in question, is perfectly rational and consistent. In all cases, the institution of an action must be preceded by a notice to the debtor, provided the debtor can be found. The question is, however, sometimes mooted whether a demand must be made by the creditor, in order that the debtor may be in *mora*, and may incur the liabilities which are incident to that predicament. This I will endeavor briefly to explain.

682. The non-performance of an obligation, is in the Roman Law styled *mora*\*; for the debtor delays performance.

But the predicament in which the debtor is placed in consequence of his non-performance, is also styled *mora*. *Debitor qui moram fecit in mora dicitur*. Being in *mora*, he incurs liabilities from which he were exempt if he were not in *mora*.

For example: The debtor in the obligation arising from the deposit of a movable for safe keeping is in *mora* if he refuses to return it on demand made by the creditor. Thenceforth he is liable for accidental damage, as well as for damage occasioned by his intention or negligence.

\* Muhlenbruch, i., 325, 339. Mackeldey, ii., 156, 165.



If he owe money payable on demand, and after demand decline or neglect payment, he is in *mora*, and is then bound to pay interest on the money which he detains, though no interest was previously payable.

Speaking generally, if no time be fixed for the performance of the obligation, the debtor is not in *mora*, and does not incur the liabilities incident to that predicament, unless a demand of performance be made by the creditor, and unless the debtor comply not with the demand. The rule is "*Interpellandus est debitor loco et tempore opportuno.*" The authors of the rule justly considered, that intention or inadvertence is of the essence of wrong; and that the obligation could not be broken, either through intention or inadvertence, until the creditor required performance.

But if a specific terminus or time be fixed for the performance, the debtor is in *mora*, unless he perform at that time, although no demand be made by the creditor. "*Dies interpellat pro homine.*" (N.B. *Interpellatio* signifies making a demand.) For here the debtor breaks the obligation, intentionally or by negligence, whether a demand be made or not by the opposite party.

683. Before I dismiss this subject, I may make this general remark. In most cases of breach of contract, the intention or negligence of the debtor is so manifest that the question is not agitated or even adverted to. But on close examination we perceive that breach of contract, as well as any other injury, necessarily supposes intention or negligence.

For instance: the questions whether or not a demand be an essential preliminary to an action, and whether or not the debtor be in *mora* without a demand, entirely depend upon the presence or absence of intention or negligence. This sufficiently appears from what has been already said on the subject. In all cases in which

the contract binds him to *diligentia*, as in cases of bailment, the question of "negligence or not," also frequently arises. In other cases the question does not arise, merely because the intention or negligence is manifest and indisputable. I make this remark because, owing to the arrangement adopted by the Roman institutional writers, one is liable to suppose that breaches of contract are not similar to other breaches of obligation, and are not even injuries at all; not being ranked with delicts or injuries, nor bearing the same name. In the arrangement of the Roman law, not only the primary obligations arising from contracts and quasi-contracts, but likewise the obligations arising from breaches of these primary obligations are said to be obligations arising *ex contractu* or *quasi ex contractu*. And in our own law we talk of actions *ex contractu*, and distinguish them from actions *ex delicto*; although the former are clearly just as much founded on injury as the latter.

684. Unlawful intention or unlawful inadvertence is, therefore, of the essence of injury, and for this reason, that the sanction could not have operated upon the party as a motive to the fulfillment of the duty, unless at the moment immediately preceding the wrong he had been conscious that he was violating his duty, or unless he would have been conscious that he was violating his duty, if he had adverted or attended as he ought.

685. If we examine the grounds of the various exemptions from liability, we shall find that most, though not all, of them are reducible to the principles which I have now stated. We shall find, generally speaking, that the party is clear of liability, because he is clear of intention or inadvertence; or, what in effect comes to the same thing, because it is presumed that he is clear of intention or inadvertence.

686. Thus: No one is liable for a mischief resulting from accident or chance *casus*.)<sup>\*</sup> That is to say, from some event, other than act of his own, which he was unable to foresee, or, foreseeing, was unable to prevent. This, I think, is the meaning of *casus* or accident in the Roman, of chance or accident in our own Law.

"By the Common Law," says Lord Mansfield, "a carrier is an insurer. It is laid down that he is liable for every accident,<sup>†</sup> except by the act of God or the king's enemies." Here, the term accident includes the acts of men; namely, of the king's enemies. And in the Digest it is expressly said, "*fortuitis casibus solet etiam adnumerari aggressura latronum.*"

In the language of the English Law, an event which happens without the intervention of man, is styled "the Act of God." The language of the Roman Law is nearly the same. Mischiefs arising from such events are styled *damna fatalia*, or *detrimenta fatalia*. They are ascribed to *vis divina*, or to a certain personage styled *fatum*. Or the *casus* or accident takes a specific name, and is called *fatalitas*.

The language of either system is absurd. For the act of man is as much the act of God as any event which arises without the intervention of man. And if we choose to suppose a certain fate or destiny, we must suppose that she or it determines the acts of men, as well as the events which are not acts of men.

Returning to the legal effect of *casus*, chance, or accident, no man is liable, civilly, or criminally, for a purely

<sup>\*</sup> Mühlenbruch, i. 179, 326, 331. Mackeldey, ii. 157. Blackstone, iv. 26; iii. 165. Heineccii Recitationes, 538, 539.

<sup>†</sup> It might have been in this case more correct to say that in the contract of carriage there is an implied warranty against the act of man except the King's enemies. Tracing the history of this principle to its source in the celebrated edict of the Prætor, "*Nautæ cauponæ stabularii, quod cujusque saluum fore receperint nisi restituent in eos judicium dabo*" (D. iv. 9), the object, according to the commentator in the Pandects, was to prevent collusion with thieves on the part of the carrier.—R. C.

accidental mischief. For, as he could not foresee the event from which the mischief arose, or was utterly unable to obviate the event or its consequences, the mischief is not imputable to his intention or negligence.

For example, If I am in possession of a house, or of a movable belonging to another, and the subject whilst in my possession is destroyed by an accidental fire, I am not liable to the owner in respect of the damage. "*Damnum ex casu sentit dominus.*"

But when I say, "that no man is liable in respect of an accidental mischief," I mean, "that he is not liable as for an injury or wrong." For, by virtue of an obligation arising aliunde, he may be liable.

To revert to the instance which I have just cited:—I am liable to the owner for the damage done by the fire, in case I contracted with him to that effect. I am also liable in case I am a carrier, and the subject has come into possession in the course of my calling. If the subject was deposited with me in order that I might keep it safely, I am also liable, according to the Roman Law, if I am in mora; that is to say, if the owner has requested me to return the subject, and I have nevertheless kept possession of it.

But in these and similar cases I am not liable as for an injury, but by virtue of an obligation *ex contractu* or *quasi ex contractu*. The mischief done by the fire is not the consequence of an injury done by me; although I shall be answerable, as for an injury, in case I perform not my special obligation to make good the loss arising from the accident.

687. Another ground of exemption is ignorance or error with regard to matter of fact.

Now, here, although the proximate ground is ignorance or error, the ultimate ground is the absence of unlawful intention or unlawful inadvertence. For unless

the ignorance or error was inevitable or invincible (or, in other words, unless it could not have been removed by due attention or advertence), the act, forbearance, or omission, which was the consequence of the ignorance or error, is imputable to negligence, heedlessness, or temerity.

I will touch briefly upon a few cases, wherein the party is exempt from civil and criminal liability, by reason of ignorance or error.

"Si quis," says Ulpian, "hominem liberum ceciderit, dum putat servum suum, in ea causa est ne injuriarum teneatur."

Another case, closely resembling the last, is the following:—If the party possess *bonâ fide* a thing belonging to another, and if the thing be damaged by his abuse or carelessness, he is not liable to the owner for the damage. "*Rem enim quasi suam neglexit.*"

The foregoing examples are taken from the Roman: the following from the English Law.

If I hire your servant, knowing that he is your servant, I am guilty of an offense against your right in the servant, and am liable to an action on the case. But if I hire your servant, not knowing that he is your servant, I am not guilty of a wrong, and am not liable to an action, until I receive notice of his previous contract with you.

If I keep a dog given to worry cattle, and if I am apprised of that his mischievous inclination, I am liable for damage done by the dog to my neighbor's cow or sheep. But unless I am apprised of his vicious disposition, I am not guilty of an injury, and am not liable to make good the damage.\* For the damage is not imputable to my intention or inadvertence.

\* The presumption which formerly existed in England in favor of the *mansueta natura* of our dogs has elsewhere been severely criticised. In a case in Scotland where sheep had been worried by a foxhound, the late

If, intending to kill a burglar who has broken into my house, I strike in the dark and kill my own servant, I am not guilty of murder, nor even of manslaughter. For the mischief is not imputable to intention or inadvertence, but to inevitable error.

And so much for ignorance or error, with regard to matter of fact.

688. Before I dismiss the subject, I will briefly advert to ignorance or error, with regard to the state of the law.

In order that an obligation may be effectual, two conditions must concur. 1st, It is necessary that the party should know the law by which the Obligation is imposed, and to which the Sanction is annexed. 2ndly, It is necessary that he should actually know, or by due attention or advertence, might actually know, that the given act, or the given forbearance or omission, would violate the law, or amount to a breach of the obligation. Unless these conditions concur, it is impossible that the sanction should operate upon his desires.

Accordingly, inevitable ignorance or error in respect to matter of fact, is considered, in every system, as a ground of exemption.

With regard to ignorance or error in respect to the state of the law, the provisions of different systems appear to differ considerably; although they all concur in assuming generally, that it shall not be a ground of exemption. "*Regula est, juris ignorantiam cuique nocere,*" is the language of the Pandects. And per Manwood, as

Lord Cockburn repudiated the principle that "every dog is entitled to have at least one worry:" and the Scotch Court agreed with him in presuming, that if a dog worry sheep, the owner is to blame. The House of Lords (Lords Cranworth and Brougham) overruled this decision (2 Macqueen, 14). An Act was subsequently passed (for Scotland) declaring it unnecessary, in an action against the owner of a dog, to prove a previous propensity to injure cattle (26 and 27 Vict. ch. 100). An Act to a similar purport was afterwards passed for England (28 and 29 Vict. ch. 60).—R. C.

reported by Plowden, "It is to be presumed that no subject of this realm is misconusant of the Law whereby he is governed. Ignorance of the Law excuseth none."

I have no doubt that this rule is expedient, or, rather, is absolutely necessary. But the reasons assigned for the rule, which I have happened to meet with, are not satisfactory.

The reason given in the Pandects is this: "In omni parte, error in jure non eodem loco quo facti ignorantia haberi debebit, quum jus finitum et possit esse et debeat: facti interpretatio plerumque etiam prudentissimos fallat."\*

Which reasoning may be expressed thus:

"Ignorance or error with regard to matter of fact, is often inevitable: that is to say, no attention or advertence could prevent it. But ignorance or error with regard to the state of the law, is never inevitable. For the law both can be and ought to be definite and knowable. Consequently, ignorance or error with regard to the law is no ground for exemption.

The reasoning involves the small mistake of confounding "is" with "can be" and "ought to be." That Law can be knowable by all who are bound to obey it, or that Law ought to be knowable by all who are bound to obey it—"finitum et possit esse et debeat," is, I incline to think, true. That any actual system is so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.

689. Blackstone produces the same pretiosa ratio, flavored with a spice of that circular argumentation wherein he delights. "A mistake," says he, "in point of Law, which every person of discretion, not only may,

\* Digest, xxii. 6, 2.

but is bound and presumed to know, is in criminal cases no sort of defense."

Now to affirm "that every person may know the law," is to affirm the thing which is not. And to say "that his ignorance should not excuse him because he is bound to know," is simply to assign the rule as a reason for itself.

The only sufficient reason for the rule in question seems to be this; that if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.

690. Ignorance would be alleged in almost every instance. And it would become incumbent upon the Court to examine the following questions of fact: 1st, Was the party ignorant of the law at the time of the alleged wrong? 2ndly, Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law inevitable ignorance? Either of these questions would be next to insoluble. The first is hardly capable of being tested by evidence; and the second would involve an interminable inquiry into the circumstances of the man's whole life.

That the party shall be peremptorily presumed conversant of the law, is a rule so necessary that law would become ineffectual if it were not applied by the Courts generally. And if due pains were taken to publish the law in a form cleared from needless complexity, the presumption would accord with the truth in the vast majority of instances. The reasoning in the Pandects would then be just. The law would be in fact as "*finitum*" and knowable, as "*possit esse, et debeat.*"

The admission of ignorance of fact as a ground of exemption, is not attended with the inconveniences



above referred to. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable.

I have said that the provisions of different systems seem to differ considerably with regard to the principle which I am now considering.

In our own law, "*ignorantia juris non excusat*" seems to obtain without exception. I am not aware of a single instance in which ignorance of law (considered *per se*) exempts or discharges the party, civilly\* or criminally.

691. From an opinion thrown out by Lord Eldon in the case of *Stockley v. Stockley*,† I inclined to think, at the first blush, that a party would be relieved, in certain instances, from a contract into which he had entered in ignorance of law. The species of transaction referred to is where a person transfers a valuable right, in consideration, as he erroneously thinks, of getting a valuable right in return. But, admitting the justness of Lord Eldon's conclusion, the agreement, I conceive, would be void, not because the party was ignorant of the law, but because there is no consideration to support the promise.‡

692. According to the Roman Law, there are certain classes of persons, "*quibus permissum est jus ignorare*," *e.g.*, women, soldiers, &c. They are exempt from liability, at least for certain purposes, not by reason of their general imbecility, but because it is presumed that their

\* In one case, however, ignorance of law is allowed in English law as at least a partial excuse. If I sell land, and it turns out that I have no title, I am not liable to pay substantial damages for the loss of the land bargained for, but only the costs occasioned by the abortive transaction. The reason is that the pitfalls in English title to land are so notorious that no one can be presumed to know whether he has a good title or not.—R. C.

† *1 Vesey and B. 31.*

‡ But *quære* whether equity will not relieve even against an executed agreement which has proceeded on a mistaken reading of a grant of doubtful construction.—*Beauchamp v. Winn*, L. R. 6 H. of L. Ap. 223, 234. Here, again, the reason given is that no negligence is imputable. If the doubt had been adverted to, there would be no relief. For here there would be no error.—*Stockley v. Stockley*, *ut supra*. Compare Lord Stair's Inst. i. 7, 9.—R. C.

information does not extend to a knowledge of the law. Such are women, soldiers, and persons who have not reached the age of twenty-five.

And this, I apprehend, shows distinctly that the exclusion of *ignorantia juris*, as a ground of exemption, is deducible from the reason which I have already assigned. In ordinary cases, the admission of *ignorantia juris* as a ground of exemption would lead to interminable inquiry. But, in these excepted cases, it is presumed from the sex, or from the age, or from the profession of the party, that the party was ignorant of the law, and that the ignorance was inevitable. The inquiry into the matter of fact is limited to a given point: namely, the sex, age, or profession of the party who insists upon the exemption.

693. Before I quit this subject, I will advert to a curious distinction made by the Roman Law.

The persons, *quibus permissum est jus ignorare*, can not allege with effect their ignorance of the law, in case they have violated those parts of it which are founded upon the "*jus gentium*."\* For the persons in question are not generally imbecile, and the *jus gentium* is knowable *naturali ratione*. With regard to the *jus civile*, or to those parts of the Roman Law which are peculiar to the system, they may allege with effect their ignorance of the law.

This coincides with our distinction between *malum prohibitum* and *malum in se*; and the distinction is reasonable. For some laws are so obviously suggested by utility, that any person not insane would naturally surmise or guess their existence; which they could not be expected to do where the utility of the law is not so obvious. And most men's knowledge of the law, and

\* Nor (*per Labeo*) can they allege it, if the law might have been conjectured, or if they had access to good legal advice. *Digest*, xxii. 6, 9.

even that of lawyers in regard to matters lying outside their own branch of practice, is mostly of this kind.

Before I conclude, I must observe that the objection to laws *ex post facto*, is deducible from the general principle already explained, namely, that intention or inadvertence is necessary to constitute an injury. The law was not in existence at the time of the given act, forbearance, or omission; consequently the party did not, and could not know that he was violating a law. The sanction could not operate as a motive to obedience, inasmuch as there was nothing to obey.

## LECTURE XXVI.

### *Grounds of Non-Imputability.—Digression on Presumptions.*

694. Towards the close of the last Lecture, I showed that the rule, *ignorantia juris non excusat*, was, according to the Roman Law, subject to certain exceptions, and that those exceptions both consist with the reason of the general maxim and serve to indicate what that reason is. I also observed that these exceptions ultimately rest on the principle which it was the main purpose of my Lecture to explain and illustrate:—and showed that wherever ignorance of law exempts from liability, the ignorance is presumed to be inevitable, and the party, therefore, to be clear from unlawful intention and inadvertence.

695. While I am on the subject of legal presumptions, I shall digress from the main subject of the Lecture, for the purpose of giving some explanations for which no other occasion may arise.

It is absurd to style conclusive inferences, presumptions. For a presumption, *ex vi termini*, is an inference

or conclusion which may be disproved. Till proof to the contrary be got, the inference may hold. On proof to the contrary, it can hold no longer.

But according to the language of the Civilians, language which has been adopted by some of our writers on evidence, presumptions are divisible in the following manner.

Presumptions are *præsumptiones juris*, or *præsumptiones hominis*. *Præsumptiones juris* are inferences drawn in pursuance of the preappointment of the law. *Præsumptiones hominis*, or presumptions simply so called, are drawn from facts of which the law has left the probative force to the discretion of the judge.\* *Præsumptiones juris*, are again divisible into *præsumptiones juris*, simply so called, and *præsumptiones juris et de jure*.

There are therefore three classes of presumptions; *præsumptiones hominis*, *præsumptiones juris*, and *præsumptiones juris et de jure*.†

\* It is hardly necessary to observe that the word "judge" is here used as including the jury, where the assistance of a jury is employed as judges of facts. We are not concerned at present with the division of functions between the judge in the popular sense of the term and the jury.—R. C.

† The following provisions of Mr. Stephen's Indian Evidence Act contain a neat statement of the three classes of presumptions as acted on by Courts administering justice according to the English rules of evidence.—R. C.

"3. In this Act . . .

"A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist.

"A fact is said not to be proved when it is neither proved nor disproved.

"4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

696. Where the presumption is a *præsumptio hominis*, not only is proof to the contrary admissible, but the presumption is not necessarily conclusive, though no proof to the contrary be adduced. For instance: I sue you for goods sold and delivered, and I produce a fact leading to a presumption that the goods were delivered. Not only is it competent to the judge to admit counter-evidence, but to reject the presumption as insufficient, though no counter-evidence be adduced.

697. Where the presumption is *præsumptio juris* simply, proof to the contrary is admissible, but, till it be produced, the presumption necessarily holds. For, here, the law has predetermined the probative force of the fact, although it permits the judge to receive counter-evidence. The law, or the maker of the law, says to the Courts, "Receive counter-evidence if it be produced, and weigh the effect of that evidence against the worth of the presumption. But till such counter-evidence be produced, draw from the given fact the inference which I predetermine."

698. Where the *præsumptio juris* is *juris et de jure*, the law predetermines the probative force of the fact, and also forbids the admission of counter-evidence. The inference (for it is absurd to call it a presumption (is conclusive. That is to say, proof to the contrary is not admissible. For, all that is meant by a conclusive proof, is a proof which the law has made so.

699. [Presumptions *juris et de jure*,\* as well as simple presumptions *juris*, are often founded on verisimilitude. But in some cases the fact presumed is highly untruth-like. In such a case the presumption is commonly called a fiction. These fictions have been resorted to by the

\* The passage here within brackets, though suggested by matter contained in Austin, is entirely recast; and the present editor is alone responsible for the propositions contained in it.—R. C.

Courts as a means of legislating indirectly. They were great favorites of the Roman Law.

It is obvious that in order fully to answer the purpose of indirect legislation, the presumption must be one *juris et de jure*. And the Roman Lawyers, with their usual logical acuteness, always made them so. A similar object is often compassed by fictitious presumptions in English Law. But as our Lawyers have seldom had the hardihood to accept the logical necessity of making the presumption *juris et de jure*, this end is attained very imperfectly. Fictions are consequently less rigid and more plastic in the English Law than in the Roman.

For example: Acquisitive prescription is unknown to the English Common Law in its direct form. In other words, length of enjoyment does not avowedly and directly, constitute a title. But in land the mere fact of possession affords a *præsumptio juris* of a title as owner, *i.e.* the title technically described as *seizin in fee*. In the case of an easement, *à profit a prendre* out of the land of another, and those various rights called franchises, uninterrupted enjoyment for more than a certain period affords the presumption of a grant, the only kind of title appropriate to these rights. But in none of these cases is the presumption at Common Law conclusive, unless the possession extends to what is called the period of legal memory, that is to the commencement of the reign of Richard I. And, inasmuch as the proof of this is obviously impossible, no such presumption is, except by aid of the Statute to be presently mentioned, *juris et de jure*.

700. To take a typical instance:—A. is in the possession of land. B. brings ejectment; and in order to succeed, must have what is called a title. A. has the ordinary advantage of a defendant to put the plaintiff to the proof. Therefore B. must prove a title. Now suppose B. proves

that he is heir-at-law to C., who was in peaceable possession of the land at his death, and who by his will devised it to his wife until her death or second marriage, remainder to his own right heirs, and that A. got into possession by marrying the widow; the Court are now bound to presume that C., being in peaceable possession of the land at his death, was seized in fee, and that B., as his heir-at-law, is the true owner. Again, suppose A. now produces a counterpart lease, by which C. took the land from D. for a term of three lives, which have expired, at a peppercorn rent, and offers to prove that he is heir-at-law to D.: B. objects that A. is estopped from setting up this title by reason that A.'s possession was merely a continuance of the possession of the widow, who, coming in under the will, could not dispute the title of her testator. The Court would probably give effect to B.'s contention; and in that case A. could, if the objection is insisted on, only make good his title by giving up possession and bringing ejectment as plaintiff. But if the Court should hold that A.'s possession was not a continuance of the widow's possession, but a new possession which did not estop him from disputing her testator's title,—or if A., instead of getting possession by marrying the widow, had come into the possession which had been left vacant by her,—then, if A. should succeed in proving his heirship to D., he would overturn the previous presumptions of law, and succeed in the proof of title.

701. In the case of title to land, the presumption raised by possession, although not a *præsumptio juris et de jure*, is something more than a mere *præsumptio juris*. The party, whether plaintiff or defendant, against whom the presumption is once established must succeed by the strength of his own title, and not by the weakness of his opponent's. And if a party establishes the fact of peaceable possession the circumstance that such possession

has been acquired by a wrongful act against a third party, although this appears on the face of his own evidence, is of no consequence. The presumption afforded by possession in English law is a weapon of vast importance—of far higher importance than any system of direct acquisitive prescription. By its use,—and with the aid of a stringent law of limitation or negative prescription,—the English Law of landed property, notwithstanding its many and great defects, is in advance of most other systems. The so-called positive prescription in the Law of Scotland is commonly elusory, and may fail notwithstanding an adverse possession for centuries.

**702.** Suppose the right in question be an easement. B. proves that he has for the period of twenty years enjoyed, as appurtenant to his lands of Y., a right of way over the lands of X. belonging to A. The Court now presumes a legal title to the easement. Before the Statute 2 & 3 Will. IV. c. 71, 1832, this was only a *præsumptio juris*, and might be defeated, amongst other ways, by showing that the user commenced at a definite period before the twenty years. In this one respect the presumption was extended by the Statute, which enacts that the claim shall not be defeated merely by showing that the easement claimed was first enjoyed at a time prior to the twenty years. But if B. had proved continued enjoyment for forty years immediately preceding the action, the presumption is extended by the Statute into a presumption *juris et de jure*, except only if it should appear that the enjoyment was had under a deed or agreement in writing. Only in the easement of ancient lights, a similar statutory presumption *juris et de jure* is raised by twenty years' enjoyment.

**703.** Again, suppose the right claimed by B. is a profit à prendre out of the land of A. What is said as to an easement, such as a right of way, applies to this species



of right, changing the periods of twenty and forty years for thirty and sixty years respectively.

704. Now a person may fail in the proof of enjoyment for the statutory period, not by reason of the non-existence of the servitude as between the dominant and servient tenements, but by reason of the suspension of its exercise, *e.g.* because, for some part of the time, the same person was seized in fee of one tenement, and seized as tenant for life of the other—for if the same person were at any time seized in fee of both, the servitude would be extinguished. The statutory aid to the presumption then fails, and the parties are thrown back upon the presumptions as obtaining at Common Law. It has also been decided, on grounds which it is difficult to understand, that the Statute does not apply to rights in gross (*Shuttleworth v. Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309). These, therefore, remain as before the Statute. Now the only difference at Common Law between such rights appurtenant and similar rights in gross was that the former might be expressly pleaded as enjoyed from time immemorial, while the latter could only be pleaded as founded on a grant. But, in the absence of an actual grant, both equally depend on presumptions. According to the theory of Law, a right in gross, being itself a tenement of an incorporeal nature, can only be constituted by a substantive grant of the right. Rights appurtenant are in one of two conditions. Either they have been, at some time, granted by the proprietor of the servient tenement, or they have been enjoyed as appurtenant to the dominant tenement for the time of legal memory, in which case the presumption (*juris et de jure*) arises that they were included in the "Tenendas" clause of some grant or charter of the dominant lands before the time of Richard I. For instance, the presumption arising from long enjoyment is rebutted if it is shown

that, at some period within legal memory, the exclusive right to the profit in question existed as a separate tenement, *i.e.* as itself the subject of a substantive grant.

705. Again, suppose the right claimed to be a franchise, as a right to levy a toll. Here the presumption is raised by proof of enjoyment for a period which is indefinitely described as a "very long time," and which would probably be not less than forty to sixty years, according to the species of facts proved. But the presumption may be rebutted by any circumstance showing that the enjoyment did not in fact extend back to the time of Richard I., and could not have been acquired by grant at any time since; or that the right claimed is such as can not, against the defendant, legally exist; *e.g.* B. claims a toll upon all goods passing through a certain town, and demands it from A., a railway company acting as carriers of the goods. But the company show that every inch of the road along which the goods are carried is vested in them as owners pursuant to the Acts of Parliament under which they are constituted. The company succeed in their defense, it being inconsistent with the dominium established in them to pay toll for goods carried by them over their own land (*Brecon Markets Company v. Neath and Brecon Railway*, L. R. 7 C. P. 555; 8 C. P. 157). Sometimes the franchise arises from a grant, or may, by a truthlike presumption, be inferred so to arise. In that case it is, properly speaking, a tenement. But sometimes this presumption would be so untruthlike that we say there is a presumption—not of a grant, but—of a legal origin prior to the time of Richard I. For instances, see the case of a marriage fee (*Bryant v. Foot*, L. R. 3 Q. B. 497). The right to dredge for oysters (*Foreman v. Free Fishers of Whitstable*, L. R. 4 H. of L. Ap. 276).—R. C.]

706. Reverting to the subject from which I have

digressed, namely, the exceptions to the principle *ignorantia juris non excusat*, I shall touch on a few to which I did not advert in my last Lecture.

707. An infant or insane person is exempted from liability, because it is inferred from his infancy or insanity that, at the time of the alleged wrong, he was not capable of unlawful intention or inadvertence, inasmuch as he neither knew the law, nor was able to apply the law as a guide to his conduct. That this is the ground of the exemption, appears from this consideration. If the infant was *doli capax*, or was conscious that his conduct conflicted with the law, his infancy does not excuse him. And this capacity may be established by evidence appropriate to the nature of the case. And if the alleged wrong was done in a lucid interval, the fact is imputed to the madman. In the case of an infant under seven years, the inference of incapacity, according to the Roman Law, and, *semble*, according to our own, is a presumption *juris et de jure*. This is a presumption probably well founded in fact in most cases. And it is made conclusive in all, on account of the little advantage which could arise from the legal punishment of a child in any instance whatever.

708. Infancy or insanity is therefore a ground of exemption, partly because the party was ignorant of the law, or is presumed to have been ignorant of the law. This does not contradict what I before said, that in English law ignorance of the law is not, *per se*, a ground of exemption. For in the case of insanity or infancy ignorance of law is only considered as one ground of the exemption in company with other grounds from which it is impossible to sever it in the particular cases.

709. In the English Law, drunkenness is not an exemption. In criminal cases, never; nor in civil cases when the ground of the liability is of the nature of a

delict ; but a party is at times released from a contract which he entered into when drunk. In the Roman Law drunkenness was an exemption even in the case of a delict ; provided the drunkenness itself was not the consequence of unlawful intention ; if, for instance, I resolve to kill you, and drink in order to get pluck, according to the vulgar expression, the mischief is ultimately imputable to my intention. In all other cases, drunkenness was a ground of exemption in the Roman Law.

The ultimate ground of this exemption is the same as in the case of insanity or infancy. The party is unable to remember the law if he knew it, or to appreciate distinctly the fact he is about, so as to apply the law to guide his conduct.

Where drunkenness which is not itself the consequence of unlawful intention is not a ground of exemption, the party, it is evident, is liable in respect of heedlessness. He has heedlessly placed himself in a position, of which the probable consequence will be the commission of a wrong.

**710.** Another ground of exemption is sudden and furious anger. In English Law, this is never a ground of exemption ; in Roman Law it is (provided it is such as to exclude all consciousness of the unlawfulness of the act) ; for the same reason as drunkenness and insanity.

Where the party is answerable for an alleged wrong done in furious anger, the reasoning is the same as in the case of drunkenness. He is guilty, not in respect of what he has done in furious anger, but in respect of his having neglected that self-discipline which would have prevented such furious fits of anger. On similar grounds, imperitia, or want of skill, is the source of a common case of liability, both in our own and in the Roman Law. Pretending to practice as a physician or as a surgeon, I do

harm to some person; in the particular case I attend with all my skill, and the mischief is not imputable to unlawful intention or inadvertence at that time, but to neglect of the previous duty of qualifying myself by study for the profession I affect to exercise.

Liability for injuries done by third parties, is ascribed justly by Mr. Bentham to the same cause. I am liable for injuries done by persons whom I employ,\* because it is generally in my power not to employ persons of such a character, or to form them by discipline and education so as to be incapable of the commission of wrong. The first reason applies to a man's servants, the last to his children. The obligation is peculiarly strong in the Roman Law, because of the great extent of the *patria potestas*; by reason of which it probably was in the power of the father not only to form the character of his child by previous discipline, but in most cases to prevent the specific mischief by specific care.†

711. Before I quit the subject, I shall remark on a distinction which is made by the Roman Lawyers, and which appears to me illogical and absurd (a rare and surprising thing in the Roman Law). I mean the distinction between delicts and quasi-delicts. From the capricious way in which they arrange offenses under these two heads, I can not discover any ground for this distinction.

\* An exception has, in English and American law, been made to this liability, where the injured person is a servant in the employ of the same master as the servant by whose act the injury ensues. This is stated to be on the ground of an implied term in the contract of service, that the servant undertakes the risks "incident to the employment," and contemplates the negligence of a fellow-servant as one of such risks. The Court of Session in Scotland long struggled against this implication, but their judgment was overruled on appeal in the *Barton's-hill Colliery case*, 3 Macq. 266, 300. See also *Feltham v. England*, L. R. 2 Q. B. 33; *Wilson v. Merry*, L. R. 1 H. of L. Sc. 321; *Gregory v. Hill*, Court of Session, Dec 14, 1869, 8 Macph. 282.—R. C.

† See Pothier, "*Traité des Obligations*," Part II. ch. vi. sec. viii. Art. II § 5. (454).

The imperitia, for instance, of a physician, is a delict ; but the imprudentia of a judge, who is liable in certain cases for erroneous decisions, is a quasi-delict. The ground of the liability in these two cases is precisely the same. The guilt of the party in both cases consists in taking upon himself the exercise of a function, without duly qualifying himself by previous preparation. And as the right violated is in both cases a right in rem, the offense is properly a delict. This distinction, therefore, appears to me to be groundless ; though I draw such a conclusion with diffidence, when it refers to any distinction drawn by the Roman Lawyers, whose distinctions I have found in almost every other case to rest on a solid foundation.

712. The party is exempted in some cases in which the sanction might act on his desires, but in which the fact does not depend on his desires.

713. Such is the case of physical constraint. In this case, he may be conscious of the obligation, and fear the sanction ; but the sanction would not be effectual if applied, because it is impossible for him to perform the obligation.

714. There is still another case which is distinguishable from this : in which the sanction might operate on the desires of the party, might be present to his mind, and the performance of the duty might not be altogether independent of his desires : but the party is affected with an opposite desire, of a strength which no sanction can control, and the sanction therefore would be ineffectual. Such for instance is the case in which a party is compelled by menaces of instant death to commit what would otherwise be a crime. The reason is that I am urged to a breach of the duty by a motive more proximate and more imperious than any sanction which the law could hold out ; and as the sanction therefore would

not be operative, its infliction would be gratuitous cruelty.

715. I believe that all these exemptions, except the two last mentioned, may be explained on the principle so often referred to, namely, that the party neither was conscious, nor could be conscious, that he was violating his duty, and consequently the sanction could not operate on his desires. It would, indeed, be more correct, instead of speaking of exemptions from liability, to say, that there are cases in which the parties are not obliged; cases to which the notion of obligation, and therefore of injury, can not apply, because the sanction could not be operative. The sanction would be ineffectual, either as not operating on the desires, as in the five first-mentioned cases, or as operating upon them in vain, as in the two cases last mentioned.

## LECTURE XXVII.

### *Different Kinds of Sanctions.*

716. Having endeavored to explain the essentials of Injuries and Sanctions, and, therein, to illustrate the nature of obligations or duties, I will now advert to the more important differences by which sanctions are distinguished.

717. And, first: Sanctions may be divided into civil and criminal; that is, into private and public.

As I remarked in a former Lecture,\* the distinction between private and public wrongs, or civil injuries and crimes, does not rest upon any difference between the respective tendencies of the two classes of offenses: All wrongs being in their remote consequences generally

\* Lecture XVII. p. 278, ante.

mischievous: and most of the wrongs styled public, being immediately detrimental to determinate persons.

But in certain cases of wrongs which are breaches of relative duties, the sanction is enforced at the instance or discretion of the injured party. In these cases, the injury and the sanction are styled civil, or private.

In other cases of wrongs which are breaches of relative duties, and in all cases of wrongs which are breaches of absolute duties, the sanction is enforced at the discretion of the Sovereign or State. It is only by the sovereign or state that the liability incurred by the wrong-doer can be remitted. And in every case of the kind, the injury and the sanction may be styled criminal or public.\*

The distinction, as I have now stated it, between civil injuries and crimes, must, however, be taken with the following explanations.

718. 1. In certain cases of civil injury, it is not competent to the injured party, either to pursue the offender before the tribunals, or to remit the liability which the offender has incurred. For example, An infant who has suffered a wrong is not capable of instituting a suit, nor of renouncing the right which he has acquired by the injury. The suit is instituted on his behalf by a general or special Guardian; who, as a trustee for the infant, may also be incapable of remitting the offender's liability.

It would, therefore, be more accurate to say, that where the wrong is a civil injury, the sanction is enforced at the instance of the injured, or of his representative.

719. 2. When I speak of the discretion of the sovereign or state, I mean the discretion of the sovereign or state as exercised according to law. For, by a special and arbitrary command, the sovereign may deprive the

\* See distinction between Civil Injuries and Crimes, in Lecture XVII. 'On Absolute Duties,' p. 278, ante.



injured of the right arising from the injury, or may exempt the wrong-doer from his civil liability; *e.g.*, by issuing letters of protection to debtors to secure them from the pursuit of their creditors. In cases of this kind the sovereign partially abrogates his own law to answer some special purpose. This is never practiced by wise governments, whether monarchical or other. The Great Frederick, in spite of his imperious temper and love of power, always conformed his own conduct to his own laws.

720. Letters of protection were granted in this country by the King, so late as the reign of William III.\* These must have been illegal. For though the King is empowered by the Constitution to pursue and pardon criminals at his own discretion, it is not competent to him to disregard the law by depriving the injured party of a right of civil action. In an analogous case, this has, however, been done by the Parliament.—A person named Wright sued a number of clergymen for non-residence;† and though he had been encouraged to bring these actions by the invitation of the existing law, Parliament passed an Act indemnifying the clergymen, and put off poor Wright with the expense of the actions which he had brought.

721. The distinction between private and public wrongs, is placed by some on another ground :

Where, say they, the injury is a crime, the end or scope of the sanction is the prevention of future injuries. Where the injury is civil, the end of the sanction is redress to the injured party.

722. Now, it is certainly true, that where the injury is treated as a crime, the end of the sanction is the preven-

\* See the case of Lord Cutts, 3 Lev. 332.

† Some of these cases are reported in Taunton, vols. v. and vi. I presume the Act referred to is 57 Geo. III. c. 99.—R. C.

tion of future wrongs. The sanction is *pœna* or punishment, strictly so called: that is to say, an evil inflicted on a given offender by way of example or warning or, to use the word commonly used by Latin writers, and more especially by Tacitus—*documentum*. If the evil did not answer this purpose, it would be inflicted to no end.

It is also true, that where the injury is deemed civil, the proximate end of the sanction is, generally, redress to the injured. But, still, the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions.

723. For, first: although the proximate end of a civil sanction is, commonly, redress to the injured party: its remote and paramount end, like that of a criminal sanction is the prevention of offenses generally. And, secondly: an action is sometimes given to the injured party, in order that the wrong-doer may be visited with punishment, and not that the injured party may be redressed. Actions of this sort, to which I shall presently revert, are styled penal: In the language of the Roman Law, *pœnæ persecutoriæ*. These propositions I will endeavor to explain.

It is clear that the necessity of making redress, and of paying the costs of the proceeding by which redress is compelled, tends to prevent the recurrence of similar injuries. The immediate effect of the proceeding is the restitution of the injured party to the enjoyment of the violated right, or the compulsory performance of an obligation incumbent upon the defendant, or satisfaction to the injured party, in the way of equivalent or compensation. But the proceeding also operates in *terrorem*.

724. Accordingly, a promise not to sue, in case the promisee shall wrong the promisor, is void, generally

satisfying, by the Roman Law; although it is competent to a party who has actually suffered a wrong, to remit the civil liability incurred by the wrong-doer. And the reason alleged for the prohibition is this: that such a promise removes the salutary fear which is inspired by prospective liability.

In short, the end for which the action is given is double: redress to the party directly affected by the injury, and the prevention of similar injuries.

Assuming, then, that the redress of the injured party is always one object of a civil proceeding, it can not be said that civil and criminal sanctions are distinguished by their ends or purposes.

725. It may, however, be urged, that the prevention of future injuries is the sole end of a criminal proceeding, whilst the end of a proceeding styled civil, is the prevention of future injuries and the redress of the injured. But even this will scarcely hold. For in those civil actions which are styled penal, the action is given to the party, not for his own advantage, but for the mere purpose of punishing the wrong-doer: *e.g.*, the power of imprisonment reserved under the Acts of 1869, under which imprisonment for debt was ostensibly abolished. The express or ostensible object of the reservation is to punish the debtor in certain cases, although it may be, and, doubtless, commonly is, used as an indirect means of obtaining redress. To the same category may be referred the cases where a trustee in bankruptcy under the Act of 1869, is ordered to prosecute.

In the Roman Law, actions of this kind are numerous.

726. For example: Theft in the Roman Law is not a crime, but a private delict: But besides the action for the recovery of the thing stolen, the thief was liable to a penalty, to be recovered in a distinct action by the injured party.

So, again, if the heirs of a testator refused to pay a legacy left to a temple or church, they were not only compelled to yield "*ipsam rem vel pecuniam quæ relicta est, sed aliud, pro pœna.*"

Although by these civil actions a right is conferred upon the party injured, the end for which the actions are given is not to redress the damage which has been suffered by him, but to punish the wrong-doer, and by that means to prevent future wrongs. Also popular actions, or actions given *cuius ex populo*, which exist both in the Roman and English Law, evidently have the punishment of the offender for their object.

727. Besides this principal distinction, there are other species of sanctions requiring notice. Laws are sometimes sanctioned by nullities. The legislature annexes rights to certain transactions—for example, to contracts—on condition that these transactions are accompanied by certain circumstances. If the condition be not observed, the transaction is void: that is, no right arises; or the transaction is voidable: that is, a right arises; but the transaction is liable to be rescinded and the right annulled, provided the means of doing so have not become too complicated, by reason of the acquisition through the transaction of rights in favor of innocent parties.

728. In certain cases, sanctions consist in pains to be endured by others, and are intended to act on us through sympathy. These Bentham has styled vicarious punishments. Forfeiture, in treason, is an instance. As it falls upon a person who by the supposition is to be hanged, it is evident that it can not affect him, but it affects those in whom he is interested, his children or relations, and may possibly, for that reason influence his conduct. Annuling a marriage has in part the same effect, since it not only affects the parties themselves whose marriage is annulled, but also bastardizes the issue.

729. Sanctions, in some other cases, consist of the application of something not itself affecting us as an evil in itself, but by way of association. Posthumous dishonor in the manner of burial in case of suicide is of this nature. This, of course, can only operate upon the mind of the party by association, since at the time when he is buried he is not conscious of the manner of his burial.

730. I now advert to the various meanings of the word sanction.

As it is at present used, it has the extensive meaning which I have attached to it, and denotes any conditional evil annexed to a law, to produce obedience and conformity to it. But the term sanction is frequently limited to punishments under a criminal proceeding. This is the sense in which the word is used by Blackstone, though not consistently. With the Roman lawyers, who adopted the term from the popular language of their own country, sanction denoted, not the pain annexed to a law to produce obedience, but the clause of a penal law which determines and declares the punishment.

In the Digest the etymology of the word is said to be this: Sanctum is defined quod ab injuria hominum defensum est, and is said to be derived from *sagmina*, the name of certain herbs which the Roman ambassadors bore as marks of inviolability. The term was transferred, in a manner not uncommon, from the mark of inviolability, to what is frequently a cause of inviolability—namely, punishment.

In other cases sanction signifies confirmation by some legal authority. Thus, we say that a Bill becomes law when sanctioned by Parliament, or that it receives the Royal sanction. The term is often used in this sense by the Roman lawyers.

Sanctio is also used to denote generally a law or legislative provision, or to denote the law or body of law.

collectively. Thus, in the beginning of the Digest, *totam Romanam Sanctionem* is used for the whole of the Roman law. *Sancire* means to enact or establish laws. These last two meanings are also instances of the transference of a term by way of association to a secondary sense.





















































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